372 N.C.—No. 3 Pages 303-361

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AUGUST 30, 2019

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE SUPREME COURT
OF
NORTH CAROLINA

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[6]Resigned 28 February 2019. [7]Appointed 28 February 2019.

SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 14 JUNE 2019

ORDERS

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

HEADNOTE INDEX

SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 8, 9
February 4, 5, 6
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April 8, 9, 10, 11
May 13, 14, 15
August 26, 27, 28, 29
September 30
October 1, 2
November 4, 5, 6, 7, 18, 19
December 9, 10, 11

STATE v. ALVAREZ

[372 N.C. 303 (2019)]

STATE OF NORTH CAROLINA
v.
SAMUEL CALLEROS ALVAREZ

No. 299A18

Filed 14 June 2019

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 818 S.E.2d 178 (2018), finding no error in a judgment entered on 13 January 2017 by Judge Richard Kent Harrell in Superior Court, Lenoir County. Heard in the Supreme Court on 29 May 2019 in session in the State Capitol Building in the City of Raleigh.

Joshua H. Stein, Attorney General, by M. Denise Stanford, Special Deputy Attorney General, for the State.

Anne Bleyman for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
ALPHONZO HARVEY

No. 290A18

Filed 14 June 2019

Homicide—self-defense instructions—not supported by evidence

The trial court did not err by declining defendant's request to instruct the jury on perfect self-defense or imperfect self-defense in his trial for murder. The evidence failed to establish that defendant was being attacked by the victim such that he feared great bodily harm or death, or that he stabbed the victim to protect himself from such harm.

Justice DAVIS did not participate in the consideration or decision of this case.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 500 (2018), finding no error after appeal from a judgment entered on 24 May 2017 by Judge Milton F. Fitch, Jr. in Superior Court, Edgecombe County. Heard in the Supreme Court on 4 March 2019.

Joshua H. Stein, Attorney General, by Thomas O. Lawton III, Assistant Attorney General, for the State.

Jeffrey William Gillette for defendant-appellant.

MORGAN, Justice.

Defendant Alphonzo[1] Harvey was charged upon a proper indictment and convicted by a jury of second-degree murder, a criminal offense in violation of N.C.G.S. § 14-17. Defendant contended on appeal that the trial court committed error by failing to instruct the jury on the

1. Defendant's first name is spelled "Alphonso" in the trial transcript. For purposes of continuity and to avoid confusion, this opinion retains the spelling of defendant's name as shown in the Court of Appeals opinion and the record on appeal.

affirmative defense of self-defense pursuant to his request. The Court of Appeals disagreed and upheld defendant's conviction, finding that in light of the evidence, defendant was not entitled to a jury instruction on any theory of self-defense. We affirm the determination of the Court of Appeals.

Factual and Procedural Background

On 11 April 2016, defendant was indicted by a grand jury for the criminal offense of first-degree murder in connection with the stabbing death of Tobias Toler. Defendant pleaded not guilty and the State elected to refrain from proceeding capitally. A jury trial was held beginning on 22 May 2017 before the Honorable Milton F. Fitch, Jr. in Superior Court, Edgecombe County, during which the State presented evidence from ten witnesses and defendant testified on his own behalf.

The evidence presented at trial tended to show the following: On 11 August 2015, Toler and four of defendant's friends attended a party at defendant's mobile home. At the party, the attendees were drinking alcohol, listening to music, and dancing. At some point, Toler was dancing with a woman with whom defendant had previously engaged in a romantic or sexual relationship. Toler had been drinking a beer with a high alcohol content from a plastic bottle, and he began staggering "all over [the] house" and acting in a rowdy manner by "getting real loud and . . . cussing and fussing." Defendant, who had consumed at least one beer by this time, realized Toler was intoxicated and testified that he "asked him to leave about seven, eight times." Toler, however, refused to depart until defendant left the dwelling as well. Defendant testified that, as he exited the trailer, Toler followed and stated that "he ought to whip [defendant's] damn ass." Toler threw the plastic beer bottle from which he had been drinking in defendant's direction, but the bottle did not make contact with defendant.

Defendant started to go back inside his mobile home but, upon realizing that Toler had not yet left the premises, turned back to confront Toler, asking, "[D]idn't I tell you [to] leave my damn house[?]" Defendant testified that, in response, Toler found "a piece of broke [sic] off little brick" and threw it at defendant, cutting defendant's finger. Toler then reached into his pocket and produced a small, black pocketknife, telling defendant that "he ought to kill [defendant's] damn ass with it."[2]

2. Defendant referred to the pocketknife in his testimony as a "little bitty, black pocketknife about two fingers long."

Defendant once again ordered Toler to leave his property, at which point defendant testified that after Toler hit him, he "hit [Toler] in the face."

Defendant then went back inside his mobile home and grabbed a knife from the top of a cabinet.[3] Defendant testified that his purpose for returning to the trailer to obtain the knife was "[b]ecause I was scared [Toler] was going to try and hurt me," and that it was defendant's belief that once he got the knife, Toler would "leave, go ahead on and leave." When defendant returned outside, he approached Toler while displaying the knife and swinging it in Toler's direction. When questioned at trial regarding his use of the knife, defendant testified that he "tried to make [Toler] leave." During the confrontation, Toler attempted to move defendant's motorized scooter which was resting against the side of the mobile home. In the process, the scooter fell to the ground, breaking its headlights.[4] Toler also slipped to the ground, but immediately returned to his feet. Defendant then approached Toler and "ma[d]e a stabbing motion about three times," piercing Toler once in the chest and puncturing his heart.

Following the stabbing, Toler attempted to run away but collapsed in a nearby resident's yard. When asked on direct examination about Toler's departure from defendant's mobile home property, defendant stated that "[a]fter the accident happened to him, he left, he ran out of the yard then." Defendant further testified that he believed that Toler "just got scared and ran," and he thought that Toler had collapsed because he was drunk. Defendant did not approach Toler after he left defendant's property; instead, defendant walked back inside the mobile home, pulled out a tissue, and cleaned Toler's blood from the blade of the knife. Defendant then placed the knife back on top of the cabinet from where defendant had initially obtained it, walked outside, and proceeded to burn the bloody tissue that he had used to clean the knife.

Defendant had given notice of his intent to assert defenses that included self-defense, and during the charge conference he requested a self-defense instruction along with an instruction on voluntary manslaughter. The trial court declined to deliver both of these requested instructions and instructed the jury to consider only whether defendant

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3. Witnesses testified that the knife resembled "an iron pipe with a blade on the end of it."

4. Defendant did not request an instruction based on the "castle doctrine" as set forth in N.C.G.S. §§ 14-51.2(b) or 14-51.3(a)(1). Defendant's counsel, to the contrary, expressly stated to the trial court that such an instruction was not warranted under the circumstances of this case. Therefore, the applicability of the castle doctrine is not before us.

was guilty of first-degree murder, the lesser-included offense of second-degree murder, or not guilty. Accordingly, no form of a self-defense instruction was given to the jury by the trial court. On 24 May 2017, the jury convicted defendant of second-degree murder for the stabbing of Toler. The trial court thereupon sentenced defendant to a term of 483 to 592 months of imprisonment.

Upon defendant's appeal, the Court of Appeals concluded that defendant was not entitled to a self-defense instruction because the evidence at trial did not establish that defendant believed that it was necessary to kill Toler in order to protect himself from death or great bodily harm. As a result, the Court of Appeals majority found no error in defendant's trial. The dissenting judge on the Court of Appeals panel expressed the opinion that the trial court should have delivered a self-defense instruction and that its failure to do so prejudiced defendant. We agree with the lower appellate court, as this Court finds the Court of Appeals' application of the pertinent law to be sound and correct. Consequently, we shall weave some of its analysis into our own.

Analysis

"The concept of self-defense emerged in the law as a recognition of a 'primary impulse' that is an 'inherent right' of all human beings." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (quoting *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927)). The principles of the two types of self-defense—perfect and imperfect—"are well established." *State v. Reid*, 335 N.C. 647, 670, 440 S.E.2d 776, 789 (1994). A defendant is entitled to an instruction on perfect self-defense as an excuse for a killing when the evidence presented at trial tends to show that, at the time of the killing:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably

> appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Bush, 307 N.C. 152, 158-59, 297 S.E.2d 563, 568 (1982) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981) (italics omitted)), *habeas corpus granted sub nom. Bush v. Stephenson*, 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd per curiam*, 826 F.2d 1059 (4th Cir. 1987) (unpublished); *see also State v. Watson*, 338 N.C. 168, 179-80, 449 S.E.2d 694, 701 (1994) (quoting *State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992)), *cert. denied*, 514 U.S. 1071 (1995), *disavowed in part in State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). The doctrine of imperfect self-defense applies when the evidence supports a determination that only the first two elements in the preceding quotation existed at the time of the killing, in which case the defendant would be guilty of the lesser included offense of voluntary manslaughter. *State v. Locklear*, 349 N.C. 118, 154-55, 505 S.E.2d 277, 298 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). Therefore, for a defendant to establish entitlement to an instruction on perfect or imperfect self-defense,

> two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

Moore, 363 N.C. at 796, 688 S.E.2d at 449 (quoting *Bush*, 307 N.C. at 160-61, 297 S.E.2d at 569). That is, when "there is no evidence from which a jury could reasonably find that defendant, in fact, believed it to be necessary to kill his adversary to protect himself from death or great bodily harm, defendant is not entitled to have the jury instructed on self-defense." *Reid*, 335 N.C. at 671, 440 S.E.2d at 789 (citing *Bush*, 307 N.C. at 161, 297 S.E.2d at 569).

Defendant contends in the case sub judice that the trial court erred by refusing to instruct the jury on self-defense. Defendant argues that the evidence presented at trial—namely, Toler's (1) aggressiveness, (2) verbal and physical threats against defendant, and (3) attack on defendant with a brick fragment, a beer bottle, and a pocketknife—entitled defendant to instructions on perfect and imperfect self-defense because he possessed reasonable fear of death or great bodily harm such that

a jury "could have found . . . that, at the time he administered the fatal wound with his knife, he believed it was necessary to kill or seriously injure Toler in order to save himself." This argument is unpersuasive.

The evidence, taken in the light most favorable to defendant, fails to manifest any circumstances existing at the time defendant stabbed Toler which would have justified an instruction on either perfect or imperfect self-defense. Despite his extensive testimony recounting the entire transaction of events from his own perspective, defendant never represented that Toler's actions in the moments preceding the killing had placed defendant in fear of death or great bodily harm such that defendant reasonably believed that it was necessary to fatally stab Toler in order to protect himself. On the other hand, defendant's own testimony undermines his argument that any self-defense instruction was warranted because, as the Court of Appeals majority correctly noted in its opinion, this Court's previous determinations have clear and direct applicability to defendant's contentions so as to eliminate his eligibility for his requested jury charge language.

The lower appellate court cited: (1) our decision in *State v. Blankenship*, 320 N.C. 152, 155, 357 S.E.2d 357, 359 (1987), for the principle that "a defendant cannot benefit from a self-defense instruction where he claims that the killing was accidental", *Harvey*, ___ N.C. App. ___, 817 S.E.2d 500, 2018 WL 3734234, at *3 (2018) (unpublished); (2) our determination in *State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995), for the premise that "defendant's self-serving statement that he was 'scared' is not evidence that defendant formed a belief that it was necessary to kill in order to save himself", *id.* at *4 (quoting *Lyons*, 340 N.C. at 662, 459 S.E.2d at 779); and (3) our declaration in *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996), for the point that a self-defense instruction is not required where defendant fired his pistol in order to get the murder victim and others to retreat, *id.* at *3. After viewing this Court's rulings in these cases as controlling, the Court of Appeals majority vividly demonstrated defendant's lack of entitlement to a self-defense instruction by quoting from an extensive passage of defendant's testimony elicited on his direct examination during which defendant twice expressly referred to his act of stabbing Toler as "the accident," explicitly stated that his purpose in going back in the trailer and picking up that knife was "[b]ecause I was scared he [Toler] was going to try and hurt me," and definitively represented that what he sought to do with the knife was "to make him [Toler] leave." *Id.* at *4.

We agree with the Court of Appeals' view of defendant's testimony at trial regarding this issue:

> [Defendant's] testimony fails to satisfy the requirements for an instruction on self-defense because it does not establish that (1) Defendant was actually being attacked by Toler such that he actually feared great bodily harm or death as a result of Toler's actions; and (2) he inflicted the fatal blow to Toler in attempt to protect himself from such harm . . . Defendant never clearly testified that he feared he was in such danger as a result of Toler's actions with the pocketknife in the moments preceding the stabbing. Nor did he ever testify as to facts demonstrating that such a fear would have been reasonable—i.e., that Toler lunged at him with the pocketknife, that Toler made any stabbing motions with the pocketknife, or that the pocketknife was even pointed in Defendant's direction. . . .
>
> Defendant's testimony also fails to demonstrate that his fear of such harm caused him to inflict that fatal blow to Toler's chest. Indeed, Defendant's failure to expressly admit to stabbing Toler with his knife further undercuts his ability to argue that the stabbing was committed as an act of self-defense.

Id. at *6. Defendant's own depictions of his act of killing Toler as an accident, his decision to obtain the knife due to being motivated by fear, and his intention to use the knife in order to persuade Toler to leave defendant's residential premises all operate to clearly invoke the application of our holdings in *Blankenship*, *Lyons*, and *Williams* so as to establish that it was not appropriate for defendant in the present case to receive the benefit of an instruction on self-defense.

In assessing defendant's contention that the trial court erred in failing to grant his request to instruct the jury on the affirmative defense of self-defense, and in evaluating the applicability of the principles of perfect and imperfect self-defense to the facts of the instant case in light of the relevant case law, we agree with the Court of Appeals' determination that the requirements for a jury instruction on self-defense do not exist in this case. Under *Bush*, defendant is not entitled to an instruction on perfect self-defense, and in light of *Locklear*, defendant is not eligible for an instruction on imperfect self-defense. Defendant has failed to satisfy the threshold requirements of *Moore* and *Reid*, both of which required defendant to present evidence that he formed a reasonable belief that it was necessary for him to fatally stab Toler in order for defendant to protect himself from death or great bodily harm, because there is no evidence from which a jury could reasonably make such a finding so as to entitle defendant to have the jury to be instructed on self-defense.

Conclusion

We conclude that the trial court did not err in declining defendant's request to instruct the jury on either the affirmative defense of perfect self-defense or imperfect self-defense. Defendant received a fair trial, free from error. Accordingly, this Court affirms the decision of the Court of Appeals.

AFFIRMED.

Justice DAVIS did not participate in the consideration or decision of this case.

Justice EARLS dissenting.

Tobias Toler was thirty-six years old when he was stabbed in the heart on 11 August 2015 and died moments later in Sharpsburg, North Carolina. His blood alcohol content at the time of his death was 0.34 and a pocketknife was found on his person. Defendant Alphonzo Harvey admitted stabbing Mr. Toler, and the only question for the jury in this case was whether the killing was justified. I dissent because I believe the trial court and this Court are making the judgment call that should be made by the jury, the twelve men and women of Edgecombe County who heard the evidence and saw the witnesses testify at trial. In so doing, the Court ignores controlling precedent and applies inconsistent standards to weigh the evidence.

This Court recently reaffirmed long-standing doctrine that:

> "The jury charge is one of the most critical parts of a criminal trial." *State v. Walston*, 367 N.C. 721, 730, 766 S.E.2d 312, 318 (2014). "[W]here competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case . . . ." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (citations and emphasis omitted); *see State v. Guss*, 254 N.C. 349, 351, 118 S.E.2d 906, 907 (1961) (per curiam) ("The jury must not only consider the case in accordance with the State's theory but also in accordance with defendant's explanation.").

State v. Lee, 370 N.C. 671, 674, 811 S.E.2d 563, 565-66 (2018) (alterations in original).

To determine whether Mr. Harvey was entitled to an instruction on self-defense, the evidence must be viewed in the light most favorable to him. *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). "An affirmative defense is one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * * .' " *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975) (citations omitted). Defendant here admitted to killing the victim; the trial judge was required to consider the evidence in the light most favorable to defendant and to ignore any inconsistent evidence in deciding whether to submit the requested self-defense or imperfect self-defense instructions. It was then the jury's job to determine defendant's guilt or innocence. By refusing to instruct the jury on self-defense when evidence supporting the instruction was present, the judge usurped the role of the jury and all but guaranteed a guilty verdict.

Rather than consider the evidence in the light most favorable to defendant, the Court here imposes a "magic words" requirement in favor of the State. In essence, the majority holds that by failing to testify using the magic words, "I was in fear of my life and believed I needed to kill Toby to save myself from death or great bodily harm," the defendant has failed to allege self-defense and, equally damning, by using the magic word "accident" in passing during his testimony to refer to the incident, defendant has foreclosed any consideration by the jury of whether he acted in self-defense. Our case law imposes no such magic word requirement or trap for defendants. Instead, the trial court must consider the defendant's evidence as true, including other testimony and evidence received at trial which tends to support it, and disregard any contradictory evidence when determining whether the jury should be instructed on self-defense. *Moore*, 363 N.C. at 796-98, 688 S.E.2d at 449-50.

The majority recounts some of defendant's evidence concerning self-defense and then finds it "unpersuasive." The question for the Court is not whether the evidence is persuasive, but whether it establishes the elements of self-defense or imperfect self-defense. With regard to the first two elements of self-defense, whether it appeared to defendant that it was necessary to kill Toler in order to protect himself from death or great bodily harm and whether that belief was reasonable, the evidence is as follows: Alphonzo Harvey repeatedly asked Toby Toler to leave his house after Toler had been drinking, was argumentative, and used foul language in front of Harvey and his female guests. Toler was "staggering all over my [Harvey's] house" and Harvey asked him seven or eight times to leave. Toler refused to do so.

Finally, Harvey walked out and Toler followed him. Toler then "said he ought to whip my [Harvey's] damn ass." Other witnesses described how Toler said to Harvey, "I will fuck you up." Toler threw a bottle of beer at Harvey.[1] Toler also threw a brick at Harvey, which Harvey testified hit his finger when he raised his hand. Witnesses said the brick hit the wall of Harvey's house with a loud thud. Toler hit Harvey; Harvey hit him back, and Toler knocked over Harvey's scooter, breaking the headlights.

Toler then pulled out a pocketknife and threatened Harvey with it: according to Harvey, "He told me he ought to kill my damn ass with it." Harvey testified that at this point, "I thought he was going to try and hurt me so." When asked why, Harvey responded, "Because he had a pocketknife." Harvey testified that he then went back into his trailer and got a knife that was mounted on the end of a wooden rod "because I was scared he [Toler] was going to try and hurt me." Harvey explained that he was just holding his knife in his hand:

> Q. Were you just holding it or were you –
>
> A. I didn't do nothing. Just holding it in my hand. I didn't do nothing.
>
> Q. At any point did you go and use your knife to physically remove him?
>
> A. No, he came up on me, coming up on me. He was walking up on me with his knife. That's when I had my knife.
>
> . . . .
>
> Q. And at what point did you hit him with your knife?
>
> A. I didn't, I just hit – he –
>
> THE COURT: Did what?
>
> . . . .
>
> A. I said hit him right there.
>
> Q. After you hit him right there with it, what did he do?
>
> A. He ran to the road.

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1. The majority describes this as a plastic beer bottle, but only one witness of several who testified to this actually said that it was plastic; other testimony indicated the bottle was glass.

Later Harvey explained that, after returning the knife to his trailer, he left the scene because "I was scared somebody might come up and try to hurt me." Taken in the light most favorable to the State, Harvey left the scene and went to a neighbor's house because he knew he had done something wrong. Taken in the light most favorable to defendant, Harvey left because he truly was afraid of Toler, and his contemporaneous action confirms that his testimony that he was scared is not simply a self-serving fabrication after the fact.

Harvey further testified that he was scared and uncertain as to what Toler would do to him, partly because he knew Toler to carry a knife at all times. "[E]vidence of prior violent acts by the victim or of the victim's reputation for violence may, under certain circumstances, be admissible to prove that a defendant had a reasonable apprehension of fear of the victim." *State v. Strickland*, 346 N.C. 443, 459, 488 S.E.2d 194, 203 (1997) (citation omitted), *cert denied*, 522 U.S. 1078 (1998); *see also State v. Irabor*, ___ N.C. App. ___, ___, 822 S.E.2d 421, 424 (2018) ("Defendant's knowledge of [the victim]'s violent propensities, *being armed*, and prior acts supports the trial court's finding that defendant reasonably believed it was necessary to use deadly force to save himself from death or great bodily harm." (emphasis added)). Based on defendant's testimony and all the circumstances, the evidence was "sufficient that defendant ha[d] a reasonable apprehension that an assault on him with deadly force [wa]s imminent." *State v. Spaulding*, 298 N.C. 149, 157, 257 S.E.2d 391, 396 (1979) (citations omitted).

On some key points, the majority ignores Harvey's testimony and credits contradictory testimony. For example, on the question of whether Toler was approaching Harvey with his knife in his hand when Harvey stabbed him, or whether Harvey approached Toler, the majority assumes the facts most favorable to the State. Despite Harvey's repeated testimony that he was scared of Toler, was afraid he would be hurt, and was being threatened with a knife by Toler, who was drunk and had just said he ought to kill him, the majority finds that the evidence "fails to manifest any circumstances existing at the time defendant stabbed Toler which would have justified an instruction on either perfect or imperfect self-defense." This is contrary to our precedents presenting very similar facts in which this Court has held that a self-defense or imperfect self-defense instruction is required.

For example, in *Spaulding* the defendant stabbed and killed another inmate who was advancing on him with his hand in his pocket, and this Court found it was error to refuse to instruct the jury on self-defense. 298 N.C. at 156-57, 257 S.E.2d at 396. In that case the reasonableness of

the defendant's belief that he was in imminent danger of great bodily harm or death "was a question for the jury." *Id.* at 157, 257 S.E.2d at 396. Similarly, in *State v. Webster* the defendant shot and killed an unarmed man who previously had been in the defendant's trailer, was asked to leave, and had left. 324 N.C. 385, 389, 378 S.E.2d 748, 751 (1989). Sometime later, the victim returned and was standing on the steps of the trailer when the defendant shot him. *Id.* at 389, 378 S.E.2d at 751. The defendant testified: "I was afraid in my condition. I could not fight him and that was the only thing I could do." *Id.* at 389, 378 S.E.2d at 751. That was sufficient evidence to submit a self-defense instruction to the jury, and the trial court's refusal to allow the defendant in that case to state whether he believed his life was threatened was reversible error. *Id.* at 393, 378 S.E.2d at 753. In relevant portions, the facts in *Spaulding* and *Webster* are similar to the facts in this case, and defendant here is entitled to a self-defense instruction, as were those defendants.

Even more relevant is *State v. Buck*, in which the Court instructed that "we reiterate that it is important for the trial court to include the possible verdict of not guilty by reason of self-defense in its final mandate to the jury." 310 N.C. 602, 607, 313 S.E.2d 550, 553 (1984). There the defendant's account of the incident was that the victim had an open pocketknife in his hand and came into the kitchen where the defendant was standing. *Id.* at 603, 313 S.E.2d at 551. The victim acted abusively and threatened to kill a third person. *Id.* at 603, 313 S.E.2d at 551. When the victim went towards the defendant while brandishing the open pocketknife, the defendant, hoping to scare the victim, grabbed a butcher knife and the two men struggled and fell to the floor, causing the butcher knife to lodge in the victim's chest. *Id.* at 603, 313 S.E.2d at 551. The defendant pulled the butcher knife out and tossed it aside, and the two kept fighting for a period of time until the victim dropped the pocketknife, got up, and walked out of the apartment. *Id.* at 603-04, 313 S.E.2d at 551-52. The victim died later that day. *Id.* at 604, 313 S.E.2d at 552. In that case the Court had no difficulty observing that, based on the defendant's evidence, "[i]f, however, the jury should conclude that he intentionally wielded the knife, then it should acquit him on the grounds of self-defense." *Id.* at 606, 313 S.E.2d at 553. There is nothing about the material facts of *Buck* to distinguish it from this case.

Part of the majority's concern here appears to be that Harvey did not say, "*I was afraid for my life and believed I had to kill my attacker.*" But, as the transcript reveals, defendant was inarticulate. Defendant testified he only completed the ninth or tenth grade. In addition to his limited education, defendant had sustained a severe head injury in a

car accident in 2008, which required insertion of a metal plate in his head. As a result of the head injury, defendant was permanently disabled and suffered memory loss. The injury also affected defendant's ability to talk and function. Inarticulate and less well coached defendants should be treated equally with those who can easily learn the "magic words" the majority would require for a self-defense instruction. The question is whether there is evidence of self-defense or imperfect self-defense, when taken in the light most favorable to defendant. *See State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) ("Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." (citations omitted))

The cases cited by the majority for the proposition that when the defendant claims the killing is accidental, or that a weapon was used solely to get the victim and others to retreat, do not apply here because Harvey clearly stated that he feared Toler was trying to hurt him and that he used his knife when Toler "came up on" him with a pocketknife. Specifically, *State v. Williams*, 342 N.C. 869, 467 S.E.2d 392 (1996), involved a defendant who testified that he fired his weapon in the air to scare those who made him feel threatened and did not shoot at anyone; *State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995), involved a defendant who testified that he fired a warning shot at the top of his door because he believed he was being robbed and that he was not trying to hit anyone; and *State v. Blankenship*, 320 N.C. 152, 357 S.E.2d 357 (1987), involved a defendant who testified that during a physical fight, he pulled out his gun to hit the victim on the head with it, after which the victim grabbed the gun by the barrel and it fired accidently. Each of these circumstances is very different from Mr. Harvey's situation, in which he testified that while he was standing on the steps of his trailer, Toler came at him with a knife and he stabbed Toler in the chest. Harvey acknowledged in his testimony that he struck the blow intentionally. The context of his later statement regarding Toler's "accident" shows that he was using the same word to refer to the incident that a previous witness had used. Annie May Alston, testifying before Harvey, stated: "Not on that particular day that the accident happened, no." Harvey then testified: "After the accident happened to him, he left." His use of the word "accident" does not directly refer to his own actions and does not negate all his other testimony regarding his fears about how Toler intended to harm him. To imply otherwise is to elevate form over substance in a manner that is unjustified by the evidence in this case.

Second-degree murder does not require that the accused acted with the intent to kill, and therefore, Harvey did not need to testify that he intended to kill Toler, only that he intended to strike the blow, as this Court explained in *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). *See State v. Carter*, 357 N.C. 345, 361, 584 S.E.2d 792, 803-04 (2003) (reaffirming *Richardson*), *cert denied*, 541 U.S. 943 (2004); *see also Lee*, 370 N.C. at 673, 811 S.E.2d at 565 (self-defense available as a defense to second-degree murder). Moreover, Toler already had threatened to kill Harvey, had hit him, and he had thrown both a bottle and a brick at him. Harvey did not need to wait for Toler to actually stab him with the pocketknife before defending himself.

Harvey may have used excessive force to repel Toler's attack, in which case the jury should have had the option of finding that Harvey acted in imperfect self-defense. *See State v. Bush*, 307 N.C. 152, 159, 297 S.E.2d 563, 568 (1982) (imperfect self-defense exists when the defendant believed it necessary to kill his adversary in order to save himself and when that belief was reasonable, but the defendant was either the aggressor or used excessive force), *habeas corpus granted sub nom. Bush v. Stephenson*, 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd per curiam*, 826 F.2d 1059 (4th Cir. 1987) (unpublished). But the jury did not have that opportunity here because the trial court erroneously failed to give a self-defense instruction. The jury, not the trial judge or this Court, has the responsibility to weigh the evidence and determine whether Alphonzo Harvey acted in self-defense, either perfectly or imperfectly, when he stabbed Tobias Toler. Accordingly, I would remand for a new trial.

SUSAN SYKES D/B/A ADVANCED CHIROPRACTIC AND HEALTH CENTER, DAWN PATRICK, TROY LYNN, LIFEWORKS ON LAKE NORMAN, PLLC, BRENT BOST, AND BOST CHIROPRACTIC CLINIC, P.A.

v.

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, CIGNA HEALTHCARE OF NORTH CAROLINA, INC., MEDCOST, LLC, AND HEALTHGRAM, INC.

No. 248A18

Filed 14 June 2019

Collateral Estoppel and Res Judicata—two class actions on appeal—same claims and theories—relitigation of issues barred by outcome of the other appeal

Where plaintiff chiropractors filed two separate putative class actions against two different sets of defendants for claims arising from insurer conduct affecting chiropractic services, plaintiffs were barred by collateral estoppel from relitigating the issues in one of the two cases because the N.C. Supreme Court affirmed the decision of the trial court in the other case, *Sykes v. Health Network Solutions, Inc.*, 372 N.C. 326 (2019), and both cases presented essentially the same claims and relied on the same theories.

Justice DAVIS did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-27(a) from an order and opinion entered on 5 April 2018 by Judge James L. Gale, Chief Business Court Judge, in Superior Court, Forsyth County, after the case was designated a mandatory complex business case by the Chief Justice under N.C.G.S. § 7A-45.4. Heard in the Supreme Court on 5 March 2019.

Oak City Law LLP, by Samuel Pinero II and Robert E. Fields III; and Doughton Blancato PLLC, by William A. Blancato, for plaintiff-appellants.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes, Elizabeth L. Winters, Peter M. Boyle, pro hac vice, and Christina E. Fahmy, pro hac vice, for Blue Cross and Blue Shield of North Carolina; Fox Rothschild LLP, by D. Erik Albright, and Kirkland & Ellis LLP, by Joshua B. Simon, pro hac vice, Warren Haskel, pro hac vice, and Dmitriy Tishyevish, pro hac vice, for Cigna Healthcare of North Carolina, Inc.; and Ellis & Winters LLP, by Stephen D. Feldman, for Medcost, LLC, defendant-appellees.

NEWBY, Justice.

This is a companion case to *Sykes v. Health Network Solutions, Inc.*, 372 N.C. 326, ___ S.E.2d ___ (2019) (hereinafter *Sykes I*). Like its companion, this case raises questions of civil liability based on insurer conduct affecting chiropractic services. Relying on and incorporating its reasoning in *Sykes I*, the trial court dismissed all claims in this case. Our Court has now issued its opinion affirming the trial court's decision in *Sykes I*. Because the decision in *Sykes I* meets the criteria for collateral estoppel, we affirm the trial court's order and opinion in this case.

This case is one of two putative class actions alleging, *inter alia*, that defendant insurers contract with Health Network Solutions, Inc. (HNS) to provide or restrict insured chiropractic services in violation of North Carolina's insurance and antitrust laws. Instead of amending the complaint in the companion case, plaintiffs chose to bring this action against defendant insurers separately from their action against HNS and its individual owners. Nevertheless, both actions present essentially the same claims and rely upon the same theories.

The facts relevant to this case are fully recited in this Court's opinion in *Sykes I*. HNS is an integrated independent practice association consisting of approximately one thousand, or approximately one-half, of North Carolina's active chiropractors. To enroll in HNS, chiropractors must agree to provide in-network care to patients who are covered by various insurers, namely, defendants in the present action, and with whom HNS has entered into exclusive agreements to provide in-network care. Chiropractors who contract to participate in the HNS network pay fees to HNS based on a percentage of the fees that insurers pay for in-network services.

In governing its chiropractors and the services they provide, HNS uses a utilization management (UM) program. Through UM, HNS and defendants review and manage enrolled chiropractors based on the cost per patient. The HNS-enrolled chiropractors may be put on probation and subject to potential termination if their average cost per patient exceeds by more than 50% a mean cost that HNS calculates.

In both of their lawsuits, plaintiffs allege that chiropractors must go through HNS to be deemed "in-network" providers for patients covered by defendant insurers. Plaintiffs contend that HNS's exclusive contracts with defendants enable a "scheme that reduces the number of medically necessary and appropriate treatments" that HNS chiropractors may

provide, which has the effect of restricting their output. Plaintiffs contend that these practices allow defendants to avoid paying for medically necessary treatments and appropriate care.

On 30 April 2013, plaintiffs initiated *Sykes I*. In that action plaintiffs asserted five claims for relief: (1) requests for a declaratory judgment on certain facts and law referenced in the complaint, including that the agreements described in the complaint "between HNS and Providers" and "between HNS and the Insurers" are "an illegal restraint of trade and anti-competitive"; (2) antitrust claims based on price fixing, monopsony, and monopoly, alleging that HNS, its owners, and insurers have illegally conspired by "[u]sing the Insurers' market power to fix the price of chiropractic services in North Carolina" and "[u]sing its utilization review procedures to continuously lower the availability of chiropractic services in North Carolina"; (3) claims under North Carolina General Statutes section 75-1.1 asserting unfair and deceptive trade practices and acts; (4) breach of fiduciary duties that HNS owners and HNS allegedly owe to the providers by, *inter alia*, "promoting a scheme to impede competition and restrict prices"; and (5) a request for punitive damages. Plaintiffs later amended their complaint to add a sixth claim for civil conspiracy.

Plaintiffs outlined four separate product markets in support of their antitrust claims: (1) "the market in which in-network managed care chiropractic services . . . are provided to the Insurers and their North Carolina patients through HNS" (HNS Market); (2) "the market for in-network chiropractic services provided to individual and group comprehensive healthcare insurers and their patients in North Carolina" (Comprehensive Health Market); (3) "the market for insurance reimbursed chiropractic services in North Carolina" (Insurance Health Market); and (4) "the market for chiropractic services provided in North Carolina" (North Carolina Market).

The trial court denied the defendants' initial motion to dismiss the claims in *Sykes I* and stayed additional proceedings pending full discovery on market definition. After discovery, plaintiffs decided to pursue the present case separately in addition to their suit against HNS. Thus on 26 May 2015, plaintiffs filed this action against certain North Carolina insurers, specifically, Blue Cross and Blue Shield of North Carolina, Cigna Healthcare of North Carolina, Inc., and Medcost, LLC (Insurers).[1]

1. Plaintiffs also initially named Healthgram, Inc. as a defendant in this action. On 11 September 2017, however, plaintiffs dismissed their claims against Healthgram.

The case was designated as a mandatory complex business case on 2 June 2015.

In their *Sykes II* complaint plaintiffs asserted essentially the same six claims from *Sykes I* but this time against Insurers: (1) requests for a declaratory judgment on certain facts and law referenced in the complaint, including that the agreements described in the complaint "between HNS and Providers" and "between HNS and the Insurers" are "an illegal restraint of trade and anti-competitive"; (2) antitrust claims, namely, claims for price fixing, monopsony, and monopoly; (3) claims under North Carolina General Statutes section 75-1.1 asserting unfair and deceptive trade practices and acts based on the antitrust allegations; (4) civil conspiracy; (5) aiding and abetting a breach of fiduciary duty; and (6) a request for punitive damages.

The defendants in *Sykes I* timely filed their motions for partial summary judgment and to dismiss. Similarly, on 25 September 2015, defendants in the present action moved to dismiss this case. On 18 August 2017, the trial court issued an order and opinion in *Sykes I* determining that "the proper market to assess the antitrust claims in [the *Sykes I*] litigation must be the North Carolina Market, which includes all insured and uninsured chiropractic services." Nonetheless, the trial court expressed concern about whether plaintiffs' filings "adequately pleaded market power in the North Carolina Market." Thus, the court requested supplemental briefing on that issue and denied the defendants' motion to dismiss the antitrust claims to the extent they were premised on the North Carolina Market.

As for the other claims in *Sykes I*, the trial court granted the defendants' motion to dismiss plaintiffs' declaratory judgment claim to the extent it was based on alleged Chapter 58 violations and plaintiffs' claim based on the defendants' purported breach of fiduciary duty. The trial court otherwise denied the motion as to the remaining claims while the antitrust issues remained pending.

After receipt of the supplemental briefing, on 5 April 2018, the trial court issued an order and opinion dismissing plaintiffs' antitrust claims in *Sykes I*, concluding that plaintiffs had not sufficiently pled that the defendants had market power within the North Carolina Market. As for the other claims, the trial court (1) dismissed plaintiffs' declaratory judgment claim premised on the antitrust claims, (2) dismissed plaintiffs' civil conspiracy claim, (3) dismissed all claims against the individual owners of HNS, and (4) dismissed plaintiffs' request for punitive damages, thereby leaving no remaining claims.

On the same day, the trial court issued the order and opinion in the present case dismissing plaintiffs' claims based on their failure to allege defendants' requisite market power in the North Carolina Market. The court noted that "[b]ecause the essential factual allegations in the two actions are the same, the Court appropriately incorporates and applies its rulings and reasoning in *Sykes I* when resolving the Motions in this case."

The trial court stated that "[t]he sufficiency of market power allegations is a 'threshold inquiry' for [plaintiffs'] Antitrust Claims." *See Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 822 F.2d 656, 666 (7th Cir.), *cert. denied*, 484 U.S. 977, 108 S. Ct. 488, 98 L. Ed. 2d 486 (1987); *see also Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir.), *cert. denied*, 516 U.S. 987, 116 S. Ct. 515, 133 L. Ed. 2d 424 (1995) (noting that market power may be demonstrated based on facts providing either direct or circumstantial evidence of that power and stating that "circumstantial evidence of market power requires that the plaintiff, at the threshold, define the relevant market"). The trial court agreed with plaintiffs that proof of actual detrimental effects "can obviate the need for an inquiry into market power." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 2019, 90 L. Ed. 2d 445, 458 (1986). Nonetheless, the trial court noted that "Plaintiffs conflate their allegation of a reduction of output *in markets the Court has rejected* with an allegation of reduction of output *in the North Carolina Market*." The trial court opined that an allegation that defendants caused a reduction of chiropractic services among in-network chiropractors cannot be deemed sufficient to allege "a reduction in output among *all chiropractors* in the North Carolina Market." Instead, the trial court reasoned that "the Complaint asserts no facts that suggest more than a shift in output from the in-network insured market to other segments of the larger North Carolina Market."

The trial court then recognized that plaintiffs' factual assertions of market power involved two related contentions: (1) "Defendants conspired together to reduce output, so the Court should aggregate the Defendant[s'] individual market shares"; and (2) "the market power of all Defendants, especially Blue Cross's alleged market power, is adequate to support a finding of combined market power by all co-conspirators in the North Carolina Market." Thus, the trial court recognized that plaintiffs attempted to assert a combination of vertical and horizontal agreements or conspiracies. The trial court set forth the definitions of each type of conspiracy and opined that plaintiffs' complaint attempted to allege a "hub-and-spokes" or "rimmed wheel" conspiracy, which involves both horizontal and vertical agreements. To adequately allege such a conspiracy, however, a plaintiff must plead facts showing an

agreement between the defendants and that "the competitors would benefit only if all the competitors participated in the scheme." The trial court recognized that "mere awareness of a competitor combined with parallel conduct is insufficient to show a horizontal conspiracy." *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 330 (3d Cir. 2010).

Here the trial court recognized that plaintiffs had "not alleged an express agreement between Insurers to reduce output of medically necessary chiropractic care," nor was there any factual allegation that "one Insurer's contract with HNS was conditioned on HNS contracting with any other Insurer." Instead, plaintiffs' allegation that "[t]he Insurers [were] aware of each other and the market power achieved by combining their patient populations under HNS's umbrella" only showed "mere awareness of a competitor combined with parallel conduct," which is ultimately "insufficient to show a horizontal conspiracy."

Alternatively, the trial court opined that even if it were "mistaken in concluding that Plaintiffs may not aggregate market power because they have not alleged a rimmed wheel conspiracy," it reiterated that plaintiffs "failed to allege that Defendants and HNS in combination possess market power in the North Carolina Market." Though plaintiffs alleged that defendants control "a materially significant percentage" of the North Carolina Market, the court found that plaintiffs "make no effort to further define what a 'materially significant' percentage might be." The trial court also rejected plaintiffs' pleadings involving specific defendants' control of the private health insurance market, opining that "any alleged market power in a narrow, rejected market does not alone support a conclusion" of market power in the North Carolina Market, which notably "is not restricted to insured chiropractic services." Thus, regardless of whether the market itself is sufficiently defined, the trial court noted that a plaintiff must assert more than "[v]ague or conclusory allegations of market power."

Though the trial court recognized North Carolina's more lenient standard for evaluating claims under Rule 12(b)(6), the trial court reasoned that a pleading based on conclusory allegations unsupported by underlying factual allegations cannot withstand an opposing party's motion to dismiss. Given that the parties conducted full market definition discovery and provided additional briefing, and because plaintiffs' pleading was based on conclusory allegations, the trial court concluded that plaintiffs failed to adequately plead market power in North Carolina. The trial court similarly concluded that plaintiffs failed to plead sufficient market power on the part of each individual defendant, thus warranting dismissal of the antitrust claims under Rule 12(b)(6).

As for the other claims, the trial court relied on its reasoning and conclusions in *Sykes I*: It dismissed plaintiffs' section 75-1.1 claim since it was premised on the alleged antitrust violations and dismissed plaintiffs' Chapter 58 claims because plaintiffs lacked standing to bring those claims. Similarly, the trial court dismissed plaintiffs' claim for aiding and abetting a breach of fiduciary duty, concluding that, as in *Sykes I*, there is "no factual basis to find that HNS owed a fiduciary duty to its network members," meaning defendants here could not have aided and abetted a breach of fiduciary duty where no fiduciary duty existed. But regardless of the merits of that claim, the trial court stated that it would not consider the claim, opining that this Court will not recognize a claim for aiding and abetting breach of fiduciary duty. Even if it did so, however, the trial court concluded that plaintiffs failed to allege each of the elements that would be required to state such a claim.

The trial court similarly determined that all of plaintiffs' declaratory judgment requests must be dismissed in that "each recasts substantive claims that the Court has rejected." Finally, because all other claims had been dismissed and North Carolina does not allow freestanding claims for either civil conspiracy or punitive damages, the trial court dismissed both of plaintiffs' remaining claims.

Plaintiffs appealed to this Court. In their arguments, however, both plaintiffs and defendants conceded that this Court's resolution of *Sykes I* at least in part determines the present case.

This Court reviews de novo a trial court's order on a motion to dismiss. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). In doing so, the Court must consider "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Coley v. State*, 360 N.C. 493, 494-95, 631 S.E.2d 121, 123 (2006) (quoting *Thompson v. Waters*, 351 N.C. 462, 463, 526 S.E.2d 650, 650 (2000)).

Collateral estoppel precludes "parties and parties in privity with them . . . from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (citations omitted); *see also Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) ("[C]ollateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." (citing *Hales v. N.C. Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594

(1994))). The doctrine of collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *King*, 284 N.C. at 356, 200 S.E.2d at 805 (quoting *Comm'r v. Sunnen*, 333 U.S. 591, 599, 68 S. Ct. 715, 720, 92 L. Ed. 898, 907 (1948)). Collateral estoppel bars litigation of claims in which

> (1) the issues [are] the same as those involved in the prior action, (2) the issues . . . have been raised and actually litigated in the prior action, (3) the issues [were] material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action [was] necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (citing *King*, 284 N.C. at 358, 200 S.E.2d at 806).

Here the parties agree that resolving this case at least in part depends on our resolution of *Sykes I*. Because we affirm the trial court's orders in *Sykes I*,[2] we now conclude that plaintiffs' claims in the present case are barred by collateral estoppel. All elements for collateral estoppel are met here. First, both *Sykes I* and this action involve claims requesting a declaratory judgment, alleging antitrust violations, asserting unfair and deceptive trade practices and acts, alleging civil conspiracy, alleging a breach of fiduciary duty (and here, aiding and abetting such a breach), and requesting punitive damages. Second, plaintiffs actually litigated all six claims in *Sykes I*, as evinced by the *Sykes I* orders dismissing all claims after market definition discovery and additional briefing. Third, all six of these claims were material and relevant to the disposition of *Sykes I* because the trial court based its resolution of the action as a whole on the determination of each of the individual claims. Finally, the trial court's orders in *Sykes I* show that these six claims were necessary and essential to the trial court's eventual decision to dismiss all claims in the action. Thus, plaintiffs' claims here are barred by collateral estoppel.

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2. We note that this Court is equally divided in its decision on the antitrust claims and the dependent civil conspiracy claims in *Sykes I*, which means that the trial court's decision on those claims is affirmed without precedential value. This Court's decision in *Sykes I* affirms the trial court's decision on all remaining claims, i.e., the declaratory judgment claim, unfair and deceptive trade practice claims, breach of fiduciary duty claims, and request for punitive damages.

Because collateral estoppel bars plaintiffs from litigating these matters given our resolution of the issues in *Sykes I*, we affirm the trial court's order dismissing plaintiffs' claims in this action.

AFFIRMED.

Justice DAVIS did not participate in the consideration or decision of this case.

SUSAN SYKES D/B/A ADVANCED CHIROPRACTIC AND HEALTH CENTER, DAWN PATRICK, TROY LYNN, LIFEWORKS ON LAKE NORMAN, PLLC, BRENT BOST, AND BOST CHIROPRACTIC CLINIC, P.A.

v.

HEALTH NETWORK SOLUTIONS, INC. F/K/A CHIROPRACTIC NETWORK OF THE CAROLINAS, INC., MICHAEL BINDER, STEVEN BINDER, ROBERT STROUD, JR., LARRY GROSMAN, MATTHEW SCHMID, RALPH RANSONE, JEFFREY K. BALDWIN, IRA RUBIN, RICHARD ARMSTRONG, BRAD BATCHELOR, JOHN SMITH, RICK JACKSON, AND MARK HOOPER

No. 251PA18

Filed 14 June 2019

1. Appeal and Error—equally divided vote of Supreme Court—no precedential value

The N.C. Supreme Court, by an equally divided vote, affirmed the Business Court's dismissal of plaintiff's antitrust claims in a case arising from insurer conduct affecting chiropractic services. The Business Court's opinion as to those claims accordingly stood without precedential value.

2. Appeal and Error—claims dismissed—claims based on same conduct dismissed

Where the N.C. Supreme Court affirmed the trial court's dismissal of plaintiffs' antitrust claims, the Court also affirmed the dismissal of plaintiffs' unfair trade practices claims that were based on the same conduct.

3. Unfair Trade Practices—learned profession exemption—chiropractors

In a case arising from insurer conduct affecting chiropractic services, plaintiff chiropractors' unfair trade practices claim was barred by the learned profession exemption in N.C.G.S. § 75-1.1(b).

All individual defendants and all members of defendant Health Network Solutions, Inc., which served as an intermediary between chiropractors and insurance companies, were licensed chiropractors, and the alleged conduct at the heart of the action was directly related to providing patient care.

4. Appeal and Error—claims dismissed—related Chapter 75 claims also dismissed

Where the N.C. Supreme Court affirmed the trial court's dismissal of plaintiffs' antitrust and unfair trade practices claims, the Court also affirmed the denial of declaratory relief to the extent that claim related to those Chapter 75 claims.

5. Insurance—alleged failure to comply with provisions of Chapter 58—no private cause of action

In a case arising from insurer conduct affecting chiropractic services, the N.C. Supreme Court affirmed the trial court's dismissal of plaintiff chiropractors' claims for declaratory relief relating to defendants' alleged failure to comply with the state's insurance laws. Chapter 58 of the N.C. General Statutes did not provide a private cause of action for plaintiffs' claims.

6. Fiduciary Relationship—contractual relationship—alleged joint venture

The N.C. Supreme Court affirmed the trial court's dismissal of plaintiff chiropractors' claims for breach of fiduciary duty. Plaintiffs' contractual relationship with defendant Health Network Solutions, Inc. (HNS), which served as an intermediary between chiropractors and insurance companies, was insufficient to establish a fiduciary duty, and plaintiffs failed to demonstrate that they were in a joint venture with HNS.

Justice DAVIS did not participate in the consideration or decision of this case.

Justice EARLS concurring in part and dissenting in part.

Chief Justice BEASLEY joins in this opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of orders and opinions dated 18 August 2017 and 5 April 2018 entered by Judge James L. Gale, Chief

Business Court Judge, in Superior Court, Forsyth County, after the case was designated a mandatory complex business case by the Chief Justice under N.C.G.S. § 7A-45.4. Heard in the Supreme Court on 5 March 2019.

Oak City Law LLP, by Samuel Pinero II and Robert E. Fields III; and Doughton Blancato PLLC, by William A. Blancato, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jennifer K. Van Zant, Benjamin R. Norman, and W. Michael Dowling, for defendant-appellees.

HUDSON, Justice.

Plaintiffs appeal the North Carolina Business Court's 18 August 2017 order and opinion granting in part and denying in part defendants' motions to dismiss and for partial summary judgment and its 5 April 2018 order and opinion dismissing plaintiffs' remaining claims under Rule of Civil Procedure 12(b)(6). Plaintiffs are licensed chiropractic providers in North Carolina who allege that defendants Health Network Solutions, Inc. (HNS) and HNS's individual owners have engaged in unlawful price fixing ultimately resulting in a reduction of output of chiropractic services in North Carolina. Specifically, plaintiffs allege that defendant HNS has committed antitrust and other violations in its role as intermediary between individual chiropractors and several insurance companies and third-party administrators,[1] who are the defendants in a separate action also before this Court.

In their Second Amended Class Action Complaint (the second amended complaint), plaintiffs raise the following claims for relief: (1) declaratory judgment, (2) price fixing, monopsony, and monopoly (the antitrust claims), (3) unfair and deceptive trade practices and acts, (4) civil conspiracy, and (5) breach of fiduciary duty. In addition, plaintiffs seek punitive damages, a remedy styled in the complaint as a separate claim for relief.

1. Plaintiffs refer to these entities as the Insurers, while defendants refer to them as the Payors. Several of these entities are defendants in a separate action filed by the same plaintiffs on 26 May 2015. An appeal from the Business Court in that companion case, *Sykes v. Blue Cross & Blue Shield of North Carolina* (No. 248A18) (*Sykes II*), is also before this Court.

Today, we affirm the Business Court's dismissal of plaintiffs' antitrust claims, including the derivative claim of civil conspiracy, by an equally divided vote, meaning that the Business Court's opinion as to those claims will stand without precedential value. We also hold that the Business Court did not err in dismissing each of plaintiffs' other claims. As for plaintiffs' unfair trade practices claim, we hold that this claim is barred by the learned profession exemption set out in N.C.G.S. § 75-1.1(b). Regarding plaintiffs' declaratory judgment claim, we hold that the relevant statutes do not provide plaintiffs a private right of action to obtain the declaratory relief that they seek. As for plaintiffs' breach of fiduciary duty claim, we hold that no fiduciary relationship existed between the parties, meaning no fiduciary duty was ever created. The Business Court correctly noted that no freestanding claim exists for punitive damages, *see Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 425, 775 S.E.2d 1, 8 (2015), and plaintiffs have no remaining legal claim to which punitive damages might attach. As so described, we affirm the decision of the Business Court dismissing plaintiffs' entire action.

Factual and Procedural Background

Plaintiffs brought this action as a putative class action lawsuit, defining the class as "all licensed chiropractors practicing in North Carolina from 2005 to the present who provided services in the North Carolina Market" and identifying as three subsets of that class all licensed chiropractors participating in the HNS Market, the Comprehensive Health Market, and the Insurance Market. Plaintiffs made the following allegations in their second amended complaint, and for the purposes of our review they are taken as true.

Defendant HNS serves as an intermediary between individual chiropractors in North Carolina and various insurance companies and third-party administrators for insurance companies. Essentially, HNS contracts with various chiropractors, who, as part of the HNS network, are able to provide chiropractic services "in-network" for the various insurance payors with whom HNS has separately contracted. In exchange for in-network access, members of the HNS network agree to permit HNS to negotiate with the payors the prices to be charged for in-network chiropractic services. A chiropractor must maintain an average per-patient cost at a certain level or risk termination from the network. Individual defendants are themselves licensed chiropractors who are current or former owners of HNS.

Plaintiffs are licensed North Carolina chiropractors (and their businesses) who previously participated in the HNS network or have never

participated in the network. Plaintiffs fall within one of these three categories: they were removed from the HNS network because their per-patient cost was too high, left the network based on HNS's policies, or declined to join the network because of HNS's practices and restraints. Plaintiffs argue that because HNS is the sole path to becoming an in-network provider for the various participating insurance companies and other payors, they are being deprived of access to the large number of patients that receive health care coverage via the networks of the various payors.

Plaintiffs' claims are largely based on the following allegations. Plaintiffs contend that HNS, despite representing that it is an integrated independent practice association (IPA), in fact "operat[es] an involuntary cartel to control competition, supply, and pricing of chiropractic services in North Carolina made possible by the exclusive contracts with the Insurers and the market power provided by those contracts." Plaintiffs contend that HNS is operating as a medical service corporation, as described in N.C.G.S. § 58-65-1, that has not become licensed as required by N.C.G.S. § 58-65-50. In addition, they contend that HNS is conducting utilization review based only on providers' average per-patient cost, which does not take into account medical necessity or appropriateness of treatment, in violation of N.C.G.S. § 58-50-61 (2017). Thus, they contend, in addition to its failure to obtain proper licensure, HNS is violating North Carolina's antitrust statutes by fixing the prices charged by more than one-half of the licensed chiropractors in the state and by monopsony, a buyer-side form of monopoly,[2] in which, rather than using its market power as a sole seller to increase the price of services, HNS is using its market power as a buyer of those services to restrict output of services. Plaintiffs allege four relevant markets that have been adversely affected by the conduct of defendant HNS: the North Carolina market, defined as the market for chiropractic services provided in North Carolina, and three submarkets within the North Carolina Market. Those submarkets are (1) the HNS Market, "the market in which in-network managed care chiropractic services . . . are

2. Monopsony is "a market situation in which one buyer controls the market." *In re Duke Energy Corp.*, 232 N.C. App. 573, 583, 755 S.E.2d 382, 389 (2014) (quoting Black's Law Dictionary 1023 (7th ed. 1999)). "[A] monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.' " *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320, 127 S. Ct. 1069, 1075, 166 L. Ed. 2d 911, 919 (2007) (citing Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297, 301, 320 (1991) and Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Buyers' Competitive Conduct*, 56 Hastings L.J. 1121, 1125 (2005)).

provided to the Insurers and their North Carolina patients through HNS"; (2) the Comprehensive Health Market, "the market for in-network chiropractic services provided to individual and group comprehensive healthcare insurers and their patients in North Carolina"; and (3) the Insurance Health Market, "the market for insurance reimbursed chiropractic services in North Carolina."

The original complaint in this action was filed on 30 April 2013, and the case was designated a mandatory complex business case on 31 May 2013, before passage of the Business Court Modernization Act (BCMA). The BCMA established that, for all cases designated as mandatory complex business cases after 1 October 2014, appeals from the North Carolina Business Court would come directly to this Court, rather than to the Court of Appeals. A second action involving essentially the same factual allegations and similar legal claims, *Sykes v. Blue Cross & Blue Shield of North Carolina* (*Sykes II*), was filed after the effective date of the BCMA, and therefore the appeal in that case lay in this Court. We granted review of this case before a determination by the Court of Appeals, thus giving us jurisdiction over the appeals in both *Sykes* actions. Plaintiffs filed a motion to consolidate the two actions in the Business Court, which the Business Court never addressed before dismissing both lawsuits entirely.

The Business Court dismissed the claims here (*Sykes I*) in two different stages. Several months after plaintiffs filed their first amended complaint, the court on 5 December 2013 ordered limited discovery on the issue of market definition for the purposes of plaintiffs' antitrust claims. This limited discovery took place between February 2014 and August 2015. Following fact and expert discovery on market definition, plaintiffs filed their *Sykes II* complaint on 26 May 2015 and their second amended complaint in this action on 16 July 2015. Defendants here filed a motion to dismiss and for partial summary judgment, which the court granted in part and denied in part in its 18 August 2017 order and opinion. In that document, the court granted summary judgment for defendants on any claims stemming from their participation in plaintiffs' three proffered relevant submarkets but denied summary judgment on antitrust claims related to the North Carolina Market and on other claims connected to those remaining antitrust claims. The court also dismissed plaintiffs' breach of fiduciary duty claim as well as plaintiffs' claim for declaratory relief to the extent that claim was based on violations of Chapter 58. Finally, the court ordered supplemental briefing on whether plaintiffs had adequately alleged market power within the one relevant market, the North Carolina Market. Following receipt of

that supplemental briefing, the court filed a second decision on 5 April 2018 dismissing all of plaintiffs' remaining claims. Plaintiffs appeal from both the 18 August 2017 and the 5 April 2018 orders and opinions of the Business Court.

Analysis

I. Standard of Review

This Court reviews de novo legal conclusions of a trial court, including orders granting or denying a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) or a motion for summary judgment under Rule 56. *See, e.g.*, *Azure Dolphin, LLC v. Barton*, ___ N.C. ___, ___, 821 S.E.2d 711, 725 (2018); *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012).

"We review a dismissal under Rule 12(b)(6) de novo, 'view[ing] the allegations as true and . . . in the light most favorable to the nonmoving party.' Dismissal is proper when the complaint 'fail[s] to state a claim upon which relief can be granted.' 'When the complaint on its face reveals that no law supports the claim . . . or discloses facts that necessarily defeat the claim, dismissal is proper.' " *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017) (first, second, and fourth alterations in original) (first quoting *Kirby v. N.C. DOT*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016); then quoting *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7-8 (2015) (third alteration in original)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017). "All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party. The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense . . . ." *Variety Wholesalers*, 365 N.C. at 523, 723 S.E.2d at 747 (ellipsis in original) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). Thus, we do not defer to the conclusions of the Business Court but conduct our own independent inquiry into the legal issues that resulted in the Business Court's orders dismissing all of plaintiffs' claims. We now affirm the Business Court's rulings for the reasons set out below.

II. Antitrust Claims

[1] As to plaintiffs' antitrust claims, the members of the Court are equally divided; accordingly, the decision of the Business Court on these claims stands without precedential value. *See, e.g.*, *Faires v. State Bd. of Elections*, 368 N.C. 825, 825, 784 S.E.2d 463, 464 (2016) (per curiam) (affirming on this basis the judgment of a three-judge panel of the Superior Court, Wake County); *Burke v. Carolina & Nw. Ry. Co.*, 257 N.C. 683, 683, 127 S.E.2d 281, 281 (per curiam) (1962) ("The other Justices, being equally divided as to the propriety of the nonsuit, the judgment of the superior court is affirmed without the decision becoming a precedent."); *see also Piro v. McKeever*, 369 N.C. 291, 291, 794 S.E.2d 501, 501 (2016) (per curiam) (affirming a Court of Appeals opinion without precedential value by an equally divided vote); *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 56, 790 S.E.2d 657, 663 (2016) (same).

III. Unfair Trade Practices

[2][3] Plaintiffs allege that defendants have committed a number of unfair trade practices in violation of N.C.G.S. § 75-1.1. Some of these allegations describe the same conduct that is the subject of plaintiffs' antitrust claims. Thus, per our discussion above, to the extent that these allegations overlap, we affirm the trial court's dismissal of plaintiffs' N.C.G.S. § 75-1.1 claims. Plaintiffs' remaining allegations under section 75-1.1 are rooted in various provisions of the Insurance Law, found in Chapter 58 of the North Carolina General Statutes. Specifically, plaintiffs allege that HNS has engaged in unfair trade practices through its failure to meet the licensure and utilization review requirements set out in N.C.G.S. §§ 58-65-50 and 58-50-61 and through other acts, which plaintiffs contend fall within the unfair and deceptive *insurance* practices that are catalogued at N.C.G.S. § 58-63-15. We do not need to directly address whether the alleged violations of Chapter 58 can support plaintiffs' claims of unfair trade practices because we conclude, as the Business Court did, that plaintiffs' claims are barred by the learned profession exemption.[3]

Section 75-1.1 states, in pertinent part:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

3. We will address plaintiffs' reliance on the Insurance Law further in our discussion of their claims for declaratory relief.

> (b) For purposes of this section, "commerce" includes all business activities, however denominated, *but does not include professional services rendered by a member of a learned profession.*
>
> . . . .
>
> (d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

N.C.G.S. § 75-1.1 (2017) (emphasis added).

This Court has not previously addressed the language of section 75-1.1(b) exempting professional services rendered by "learned professionals" from the coverage of our state's unfair and deceptive trade practices (UDTP) statute. However, as our Court of Appeals has recognized, we conduct a two-part inquiry to determine whether the "learned profession" exemption applies: "[F]irst, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services." *Wheeless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 589, 768 S.E.2d 119, 123 (2014) (quoting *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000)), *appeal dismissed and disc. rev. denied*, 368 N.C. 247, 771 S.E.2d 284 (2015). In determining what sort of conduct is exempted, the Court of Appeals has also explained that "a matter affecting the professional services rendered by members of a learned profession . . . falls within the exception in N.C.G.S. § 75-1.1(b)." *Burgess v. Busby*, 142 N.C. App. 393, 407, 544 S.E.2d 4, 11-12 (citations omitted), *appeal dismissed*, 353 N.C. 525, 549 S.E.2d 216, *and disc. rev. improvidently allowed per curiam*, 354 N.C. 351, 553 S.E.2d 679 (2001).

Our Court of Appeals has long held that members of health care professions fall within the learned profession exemption to N.C.G.S. § 75-1.1, and "[t]his exception for medical professionals has been broadly interpreted." *Shelton v. Duke Univ. Health Sys., Inc.*, 179 N.C. App. 120, 126, 633 S.E.2d 113, 117 (2006) (first citing *Phillips v. A Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 377-79, 573 S.E.2d 600, 604-05 (2002); then citing *Burgess*, 142 N.C. App. 393, 544 S.E.2d 4 (2001); then citing *Gaunt v. Pittaway*, 139 N.C. App. 778, 534 S.E.2d 660 (2000); then citing *Abram v. Charter Med. Corp. of Raleigh, Inc.*, 100 N.C. App. 718, 722-23, 398 S.E.2d 331, 334 (1990); and then citing *Cameron v. New Hanover Mem'l Hosp., Inc.*, 58 N.C. App. 414, 447, 293 S.E.2d 901, 921 (1982)), *disc. rev. denied*, 643 S.E.2d 591 (N.C. 2007). For example, in *Wheeless v. Maria Parham Medical Center, Inc.*, the Court of Appeals

determined that the learned profession exemption barred a section 75-1.1 claim by a medical doctor against a hospital and individual physicians in which the plaintiff physician alleged that the defendants had made an anonymous complaint about him to the North Carolina Medical Board. 237 N.C. App. at 585-86, 768 S.E.2d at 121. The court rejected Wheeless's argument that the exemption did not apply "because, by 'illegally access[ing], shar[ing], and us[ing] Plaintiff's peer review materials and patients' confidential medical records out of malice and for financial gain for illegal improper purpose[,]' " defendants did not render professional services. *Id.* at 589, 768 S.E.2d at 123 (alterations in original). Rather, the court viewed "defendants' alleged conduct in making a complaint to the Medical Board as integral to their role in ensuring the provision of adequate medical care"; accordingly, the learned profession exemption barred plaintiff's action. *Id.* at 591, 768 S.E.2d at 124.

Plaintiffs argue that the exemption should not apply here because, although the individual defendants are all licensed chiropractors, HNS itself is not a member of a learned profession and, in any event, HNS's role as an intermediary between providers and insurers is a business activity that cannot be properly described as "render[ing]" professional services.

Plaintiffs point us to the recently decided case of *Hamlet H.M.A., LLC v. Hernandez*, ___ N.C. App. ___, 821 S.E.2d 600 (2018), *disc. rev. denied*, ___ N.C. ___, 822 S.E.2d 637 (2019), *and disc. rev. denied*, ___ N.C. ___, 822 S.E.2d 640 (2019), in support of their argument that the activities alleged in this case do not fall within the ambit of "professional services rendered." In *Hamlet* the Court of Appeals considered whether a physician's UDTP counterclaim rooted in a dispute over an employment contract was barred by the learned profession exemption. *Id.* at ___, 821 S.E.2d at 602-03. The Court of Appeals concluded that the learned profession exemption did not bar the claim, reasoning that "cases addressing UDTP claims in a medical context do not suggest that negotiations regarding a business arrangement, even between a physician and a hospital, are '*professional services rendered* by a member of a learned profession' " under N.C.G.S. § 75-1.1(a). *Id.* at ___, 821 S.E.2d at 608. The Court of Appeals further concluded: "If we were to interpret the learned profession exception as broadly as plaintiffs suggest we should, any business arrangement between medical professionals would be exempted from UDTP claims. The learned profession exception does not cover claims simply because the participants in the contract are medical professionals." *Id.* at ___, 821 S.E.2d at 608.

While we agree that the mere status of a defendant as a member of a "learned profession" does not shield that defendant from any claim under N.C.G.S. § 75-1.1 regardless of how far removed the claim is from that defendant's professional practice, we conclude that the conduct alleged here does fall within the exemption. All individual defendants, as well as all members of HNS, are licensed chiropractors, thus meeting the exemption's first prong. We also agree with defendants and the court below that the activity alleged in the second amended complaint constitutes rendering of professional services under the statute.

The alleged conduct that is at the heart of this action is directly related to providing patient care. Plaintiffs argue that HNS is engaged both in violations of our state's antitrust laws and in conduct forbidden under our Insurance Law, in that HNS terminates providers' in-network access to patients when those providers exceed a certain average cost per patient. Thus, plaintiffs contend, in order to retain in-network status with the insurance payors with whom HNS contracts, chiropractic providers must limit their average cost of services per patient and, thus, the number of treatments provided to their patients. If a particular chiropractor renders services to patients who require, on average, more extensive chiropractic care than the patients of other providers who contract with HNS, that provider risks exceeding HNS's allowable average cost and losing access to patients served via the networks of the various payors.

In addition, plaintiffs allege that—through the operation of HNS's monopsony—chiropractic services are being reduced, meaning that North Carolinians who were previously receiving care from providers in HNS's network have either ceased receiving this care or have received fewer services due to HNS's enforcement of its average cost cap on providers. Since the basis for plaintiffs' UDTP claim is that chiropractors are reducing the level of services patients receive, we conclude that the conduct alleged in the second amended complaint is sufficiently related to patient care to fall within the rendering of professional services, as that term has been previously interpreted by the courts of this state. Thus, we affirm the Business Court's dismissal of plaintiffs' unfair trade practice claims under N.C.G.S. § 75-1.1.

IV. Declaratory Judgment

[4] In their second amended complaint, plaintiffs also sought relief under the Declaratory Judgment Act as follows:

> a. HNS is an unlicensed medical service corporation without the authority to enter into an agreement to provide chiropractic services to the Insurers;

b. HNS is an unlicensed medical service corporation without the authority to enter into participation agreements with Providers;

c. HNS is not licensed or authorized to provide utilization review of chiropractors including the Providers;

d. The purported agreements between HNS and Providers are illegal and unenforceable;

e. The purported agreements between HNS and Providers are an illegal restraint of trade and anti-competitive;

f. The purported agreements between HNS and the Insurers are illegal and unenforceable;

g. The purported agreements between HNS and the Insurers are an illegal restraint of trade and anti-competitive;

h. The exclusivity provisions of the contracts and the exclusivity practices between HNS and the Insurers are illegal, anti-competitive unreasonable restraints of trade, unfair trade practices, and unenforceable;

i. HNS's Utilization Review Process is an illegal unfair trade practice;

and

j. Defendants have restrained trade, committed unfair trade practices, and monopsonized the market for chiropractic services in violation of N.C. Gen. Stat. §§ 75-2 and 75-2.1.

As demonstrated above, much of the declaratory relief plaintiffs seek comes in the form of legal conclusions that we have already addressed in our earlier discussion of plaintiffs' antitrust claims and their claim that defendants have engaged in unfair trade practices under N.C.G.S. § 75-1.1. Thus, we also affirm the Business Court's denial of declaratory relief to the extent that claim relates to plaintiffs' Chapter 75 claims.

[5] Several of the declarations sought by plaintiffs, however, relate to their claims that defendants fail to comply with various provisions of the state's Insurance Law found in Chapter 58 of the North Carolina General Statutes. The Business Court ruled that Chapter 58 does not provide plaintiffs a private cause of action, meaning that their claims for declaratory relief under Chapter 58 must be dismissed. We agree.

As discussed by the Business Court, a statute may authorize a private right of action either explicitly or implicitly, *see Lea v. Grier*, 156 N.C. App. 503, 508-09, 577 S.E.2d 411, 415-16 (2003), though typically, "a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute," *Time Warner Entm't Advance/Newhouse P'ship v. Town of Landis*, 228 N.C. App. 510, 516, 747 S.E.2d 610, 615 (2013) (quoting *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 338 n.2, 511 S.E.2d 41, 44 n.2, *cert. denied*, 350 N.C. 851, 539 S.E.2d 13 (1999).

Chapter 58 does not explicitly provide a private cause of action and, as noted by the Business Court, several decisions in recent years from both our Court of Appeals and our state's federal district courts have determined that no private cause of action exists under other portions of Chapter 58. *See*, *e.g.*, *Cobb v. Pa. Life Ins. Co.*, 215 N.C. App. 268, 281, 715 S.E.2d 541, 552 (2011) (finding no private cause of action under N.C.G.S. § 58-3-115); *Defeat the Beat, Inc. v. Underwriters at Lloyd's London*, 194 N.C. App. 108, 117-18, 669 S.E.2d 48, 54 (2008) (stating that no private right of action exists under N.C.G.S. § 58-21-45(a)). Rather, courts have previously concluded that alleged violations of this Chapter may only be remedied through action by the Commissioner of Insurance. Thus, the Business Court concluded that there was "no legislative implication that sections 58-50-61, 58-65-1, and 58-65-50 allow for enforcement by a private party."

Plaintiffs seek declarations that HNS is required to be licensed as a medical service corporation under N.C.G.S. § 58-65-50 or as a utilization review organization defined by N.C.G.S. § 58-50-61(a)(18). Section 58-65-50 states that "[n]o corporation subject to the provisions of this Article and Article 66 of this Chapter shall issue contracts for the rendering of hospital or medical and/or dental service to subscribers, until the Commissioner of Insurance has, by formal certificate or license, authorized it to do so" and then describes the materials to be provided to the Commissioner as part of the licensure application. N.C.G.S. § 58-65-50 (2017).

Section 58-50-61 governs the procedures for utilization review, defined as "a set of formal techniques designed to monitor the use of or evaluate the clinical necessity, appropriateness, efficacy or efficiency of health care services, procedures, providers, or facilities." *Id.* § 58-50-61(a)(17) (2017). A "utilization review organization" is "an entity that conducts utilization review under a managed care plan, but does not mean an insurer performing utilization review for its own health benefit plan." *Id.* § 58-50-61(a)(18). According to N.C.G.S. § 58-50-61(o), a violation of the utilization review provisions is subject to the penalties set out in

N.C.G.S. § 58-2-70. Section 58-2-70, in turn, provides that "[w]henever the Commissioner has reason to believe that any person has violated any of the provisions of this Chapter, . . . the Commissioner may, after notice and opportunity for a hearing, proceed under the appropriate subsections of this section." *Id.* § 58-2-70(b) (2017).

Plaintiffs argue that our state's Declaratory Judgment Act gives them a path to declaratory relief, notwithstanding Chapter 58's language vesting enforcement authority in the Commissioner of Insurance. In addition, plaintiffs argue that the Business Court erred in ignoring a line of cases declining to enforce contracts entered into by unlicensed professionals. For example, plaintiffs point us to *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968) (recognizing that state law bars an unlicensed contractor from maintaining a breach of contract action against the owner of a building valued at more than the minimum sum specified in the licensing statutes governing general contractors) and *Gower v. Strout Realty, Inc.*, 56 N.C. App. 603, 289 S.E.2d 880 (1982) (recognizing that our courts have held contracts by unlicensed real estate brokers to be invalid).

We conclude that the language of the statutory provisions, as well as the previous cases interpreting other portions of Chapter 58, vest enforcement of the requirements of the statutory sections identified by plaintiffs in the Commissioner of Insurance, meaning that plaintiffs do not have a private right of action for declaratory relief under these provisions. We also agree with the Business Court that the cases cited by plaintiffs are distinguishable in that "[t]hose cases did not seek to substitute a court's judgment for that of a regulatory agency to which the legislature has entrusted enforcement." Thus, we conclude that the Business Court properly denied all of plaintiffs' claims for declaratory relief.

V. Breach of Fiduciary Duty

[6] Finally, plaintiffs contend that defendants breached a fiduciary duty that they owed to plaintiffs and all members of the putative class.[4] To establish a claim for breach of fiduciary duty, a plaintiff must show that: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff. *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013). Thus, to make out a claim for breach of a fiduciary duty, plaintiffs must first allege facts that, taken as true,

4. This claim necessarily applies only to those plaintiffs who participated at one time in the HNS network.

demonstrate that a fiduciary relationship existed between the parties. A fiduciary relationship "has been broadly defined by this Court as one in which 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). "The very nature of some relationships, such as the one between a trustee and the trust beneficiary, gives rise to a fiduciary relationship as a matter of law. The list of relationships that we have held to be fiduciary in their very nature is a limited one, and we do not add to it lightly." *CommScope Credit Union*, 369 N.C. at 52, 790 S.E.2d at 660 (first citing *Wachovia Bank & Tr. Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967); then citing *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014)). Our courts have been clear that general contractual relationships do not typically rise to the level of fiduciary relationships. "[P]arties to a contract do not thereby become each other's fiduciaries; they generally owe no special duty to one another beyond the terms of the contract . . . ." *Branch Banking & Tr. Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (citations omitted), *disc. rev. denied*, 332 N.C. 482, 421 S.E.2d 350 (1992).

Plaintiffs allege that they have a fiduciary relationship with defendants because they entered into a joint venture with HNS. In the alternative, plaintiffs argued before the Business Court and this Court that a fiduciary relationship was created under agency law, in that HNS purported to act as plaintiffs' agent in negotiations with the insurance payors. We agree with the Business Court that plaintiffs' allegation of a fiduciary duty—and, therefore, their claim of a breach of that duty—fails as a matter of law.

We begin by addressing plaintiffs' alternative argument: that agency principles dictate that HNS was acting as an agent for plaintiffs as a matter of law when negotiating the terms governing in-network providers' relationship with the medical payors. As discussed above, typical contractual relationships do not give rise to the special status of a fiduciary relationship. We believe that plaintiffs' agency argument ignores this principle and seeks to establish a fiduciary relationship arising out of the operation of a general business relationship.

Next we address plaintiffs' argument that they are in a fiduciary relationship with HNS by virtue of a joint venture. As the Business Court pointed out, plaintiffs cannot show that they are in a joint venture with defendants for two reasons. First, "[a] joint venture exists when there is: '(1) an agreement, express or implied, to carry out a single business

venture *with joint sharing of profits*, and (2) an *equal right of control* of the means employed to carry out the venture.' " *Rifenburg Constr., Inc. v. Brier Creek Assocs. Ltd. P'ship*, 160 N.C. App. 626, 632, 586 S.E.2d 812, 817 (2003), *aff'd per curiam*, 358 N.C. 218, 593 S.E.2d 585 (2004) (quoting *Rhoney v. Fele*, 134 N.C. App. 614, 620, 518 S.E.2d 536, 541 (1999), *disc. rev. denied*, 351 N.C. 360, 542 S.E.2d 217 (2000)). Plaintiffs' own allegations of lack of control and unequal sharing of profits and losses defeat this argument. Second, as the Business Court points out, plaintiffs' own agreements with HNS specifically disclaim any joint venture between the parties, stating that "[n]o work, act, commission, or omission of either party pursuant to the terms and conditions of this Agreement shall make or render HNS or Participant an agent, servant, or employee of, *or joint venture* with the other." (Emphasis added.) Thus, on the face of their contracts with HNS, plaintiffs agreed that no joint venture was formed via the parties' contractual relationship.

Plaintiffs seek to avoid the plain language of their agreements with HNS through their broader argument that these contracts are illegal because HNS has not complied with the licensure requirements of Chapter 58 and thus had no authority to enter into the agreements at issue here. Because we have concluded that the licensure provisions of Chapter 58 fall squarely within the purview of the Commissioner of Insurance and that, therefore, the General Statutes do not provide plaintiffs a private right of action to seek a declaratory judgment that their agreements with HNS are void, we have already rejected plaintiffs' collateral challenge to the contracts. Thus, based on the joint venture elements that are not met here as well as the language of the contracts, we are persuaded that plaintiffs have no joint venture with defendants. Because plaintiffs' contractual relationship with HNS is insufficient to establish a fiduciary relationship as a matter of law, we affirm the Business Court's dismissal of plaintiffs' breach of fiduciary duty claim.

Conclusion

Because we affirm the Business Court's rulings dismissing each of plaintiffs' substantive claims alleged in their second amended complaint, as well as all derivative claims, we affirm the Business Court's orders dismissing plaintiffs' entire action. As noted above, the members of the Court being equally divided on plaintiffs' antitrust claims, including the derivative claim of civil conspiracy, the Business Court's dismissal of these claims stands without precedential value.

AFFIRMED.

Justice DAVIS did not participate in the consideration or decision of this case.

Justice EARLS concurring in part and dissenting in part.

I dissent from the holding of Section III of the majority opinion concerning the extent to which plaintiffs' allegations of unfair and deceptive trade practices that are not based on the same allegations as their antitrust claims are barred by the "learned profession" exclusion of N.C.G.S. § 75-1.1(a). In all other respects I concur with the remainder of the opinion. This Court has not previously interpreted the scope of the statutory learned profession exception to the general prohibition on unfair methods of competition and unfair and deceptive trade practices. In my view, the specific allegations of the complaint relating to that claim in this case do not properly fall within the scope of that exception because the alleged unfair and deceptive conduct in question was not the rendering of professional services, namely chiropractic services, to patients. Therefore, I would reverse the 18 August 2017 ruling of the business court, *Sykes v. Health Network Solutions, Inc.*, No. 13 CVS 2595, 2017 WL 3601347 (N.C. Super. Ct. Forsyth County (Bus. Ct.) Aug. 18, 2017) (*Sykes I*), with regard to claims under the unfair and deceptive trade practices act, N.C.G.S. § 75-1.1 (UDTP) that are based on allegations separate and distinct from the antitrust claims, and remand for further proceedings on those claims.

Most of the allegations in this case relate to plaintiffs' claims that defendant Health Network Solutions, Inc. (HNS) operates an intermediary network for chiropractic services that functions as a monopsony, a buyer-side form of restraint of trade to control competition, supply, and the pricing of chiropractic services in North Carolina. Indeed, almost all of the trial court's first order, which is the order dismissing the UDTP claims, actually addresses the antitrust claims. There has been scant attention to the UDTP allegations that are separate and apart from the antitrust claims.

The UDTP claim for relief in plaintiffs' second amended complaint alleges thirteen grounds, of which seven relate to antitrust violations and anticompetitive conduct.[1] Of the remaining six, one is a conclusory

1. The antitrust and anticompetitive conduct are alleged in subparagraphs a-c, f, h, k, & *l* of paragraph 162 of the Second Amended Class Action Complaint filed on 20 July 2015.

characterization that does not specify any particular behavior.[2] The five allegations based on distinct conduct not encompassed by the antitrust claims are that "Defendants' actions and conduct that constitute unfair and deceptive trade practices include, but are not limited to:"

> d. implementing a utilization review procedure without being authorized or licensed to do so;
>
> e. failing to follow statutory requirements for utilization review;
>
> . . . .
>
> g. organizing a medical service corporation without being licensed to do so;
>
> . . . .
>
> i. failing to disclose their conflicts of interest;
>
> j. misrepresenting their services and the benefits provided to Providers participating in the HNS Network[.]

Plaintiffs make additional allegations relevant to this claim, including that defendants were engaged in commerce and that these unfair and deceptive practices have caused plaintiffs damages in excess of $10,000. Thus, on a motion to dismiss under Rule 12(b)(6), reviewed de novo by this Court, the question is whether, if true, the allegations state a claim for relief under some legal theory. *Corwin ex rel. Corwin Tr. v. British Am. Tobacco PLC*, ___ N.C. ___, ___, 821 S.E.2d 729, 736 (2018) (citing *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016)).

The General Assembly enacted N.C.G.S. § 75-1.1 almost exactly fifty years ago, stating that:

> The purpose of this Section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings

2. Paragraph 162(m) alleges that defendants have violated the UDTP by "acting unfairly and oppressively toward Plaintiff and the Class in their dealings with them in an abuse of power and position to achieve ends and using means contrary to the public policy of this State."

> between buyers and sellers at all levels of commerce be had in this State.

Act of June 12, 1969, ch. 833, sec. 1(b), 1969 N.C. Sess. Laws 930, 930. In 1977 the statute was "amended . . . to define 'commerce' inclusively as 'business activit[ies], *however denominated*,' " *Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991), subject to the express limitation for "professional services rendered by a member of a learned profession," Act of June 27, 1977, ch. 747, sec. 2, 1977 N.C. Sess. Laws 984, 984. As this Court explained in *Bhatti*, consistent with the purpose of the law to protect the consuming public and the generally broad definition of the term "business," the statute is intended to have an inclusive scope, 328 N.C. at 245-46, 400 S.E.2d at 443-44, and the 1977 amendments in particular were "intended to expand the potential liability for certain proscribed acts," *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049, 1057 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981).

The statute is not limited to cases involving consumers only. "After all, unfair trade practices involving only businesses affect the consumer as well." *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988). The Court has previously explained that " '[b]usiness activities' is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). Moreover, " '[c]ommerce' in its broadest sense comprehends intercourse for the purposes of trade in any form." *Sara Lee Corp. v. Carter*, 351 N.C. 27, 32, 519 S.E.2d 308, 311 (1999) (quoting *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980)).

Our courts have employed a three-prong test to establish a prima facie case under this statute. *Spartan Leasing Inc. of N.C. v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991). A plaintiff must show "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff." *Id.* at 460-61, 400 S.E.2d at 482 (citing *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981)); *see also First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998) (same). Unfair competition has been described generally as conduct "which a court of equity would consider unfair." *Pinehurst, Inc. v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 59, 338 S.E.2d 918, 923 (citing William B. Aycock, *North Carolina Law on Antitrust and Consumer*

Protection, 60 N.C. L. Rev. 207, 217 (1982)), *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986). "[A] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Barbee v. Atl. Marine Sales & Serv.*, 115 N.C. App. 641, 646, 446 S.E.2d 117, 121 (quoting *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403), *disc. rev. denied*, 337 N.C. 689, 448 S.E.2d 516 (1994). "[A]ll the facts and circumstances surrounding the transaction" are relevant to determining "[w]hether an act or practice is unfair or deceptive." *Id.* at 646, 436 S.E.2d at 121 (citing *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403). Bad faith or deliberate acts of deceit do not need to be shown. *Boyd v. Drum*, 129 N.C. App. 586, 593, 501 S.E.2d 91, 97 (1998) (citing *Forsyth Mem'l Hosp., Inc. v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 169-70 (1992), *disc. rev. denied*, 333 N.C. 344, 426 S.E.2d 705 (1993)), *aff'd per curiam*, 350 N.C. 90, 511 S.E.2d 304 (1999).

In this case, plaintiffs' allegations, as summarized in subparagraphs d, e, g, i, and j of the claim for relief (hereinafter "the non-antitrust conduct") if true, establish all three elements of a prima facie case of unfair and deceptive trade practices affecting commerce that have injured plaintiffs. The only argument made by defendants on the motion to dismiss, and the only ground found by the trial court, was that none of these allegations can support a claim for relief because chiropractors are learned professionals and "[t]he impact of the Plaintiffs' claim is to fundamentally change the marketplace in which chiropractors deliver their services and the way in which insurance companies contract for the delivery of those services." Thus, the only question before this Court is whether defendants' actions as alleged, summarized in those five counts of the claim for relief and as more fully described throughout the second amended complaint, are subject to the exception for "professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b) (2017).

I agree with the majority that our Court of Appeals has followed, and we do well to adopt, a two-part inquiry to determine whether the "learned profession" exclusion applies: "[F]irst, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services." *Wheeless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 589, 768 S.E.2d 119, 123 (2014) (quoting *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000) (citation omitted)). I also agree that the first prong is met here even though HNS is itself an association of chiropractors acting as an intermediary between providers and insurers.

What seems clear to me is that the non-antitrust conduct alleged in the complaint does not involve providing professional services. Therefore, the second prong of the test is not met here.

The Court of Appeals cases addressing this question have held that when a doctor or lawyer or other member of a learned profession is engaging in business negotiations or contractual arrangements, advertising his or her practice, or buying real estate, even though those activities "affect" the provision of professional services, they are not themselves *professional services* entitled to an exemption. *See Hamlet H.M.A., LLC v. Hernandez*, ___ N.C. App. ___, ___ 821 S.E.2d 600, 608 (2018) ("This case involves a business deal, not rendition of professional medical services."), *disc. rev. denied*, ___ N.C. ___, 822 S.E.2d 637, *and disc. rev. denied*, ___ N.C. ___, 822 S.E.2d 640 (2019). In *Reid v. Ayers*, for example, while the conduct at issue involved the provision of professional services by an attorney, the Court of Appeals explained that:

> [N]ot all services performed by attorneys will fall within the exemption. Advertising is not an essential component to the rendering of legal services and thus would fall outside the exemption. *See* 47 N.C. Op. Att'y Gen. 118, 120 (1977) ("Advertising by an attorney is a practice apart from his actual performance of professional services. Indeed, it is not a professional practice at all, but rather a commercial one."). Likewise, the exemption would not encompass attorney price-fixing. *Id.* Although no bright line exists, we think that the exemption applies anytime an attorney or law firm is acting within the scope of the traditional attorney-client role. It would not apply when the attorney or law firm is engaged in the entrepreneurial aspects of legal practice that are geared more towards their own interests, as opposed to the interests of their clients.

138 N.C. App. at 267-68, 531 S.E.2d at 236 (citing *Short v. Demopolis*, 103 Wash. 2d 52, 60-61, 691 P.2d 163, 168 (1984) (en banc)). The dividing line between what is, and what is not, the rendering of professional services should turn on whether learned professional knowledge and judgment that the ordinary person does not possess is required to provide the services at issue. That is what distinguishes cases involving staff privileges at hospitals and complaints to medical boards, as were at issue in *Cameron v. New Hanover Memorial Hospital, Inc.*, 58 N.C. App. 414, 293 S.E.2d 901, *appeal dismissed and disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982), and *Wheeless*, respectively, from this case and from *Hamlet H.M.A.* "The rendering of a professional service is limited

to the performance of work '[c]onforming to the standards of a profession' and 'commanded or paid for by another.' " *Phillips v. A Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 381, 573 S.E.2d 600, 605 (2002) (citations omitted), *aff'd per curiam in part and disc. rev. improvidently allowed in part*, 357 N.C. 576, 597 S.E.2d 669 (2003). In *Cameron*, the Court of Appeals explained that the actions complained of by the plaintiffs were not commercial activities subject to UDTP coverage because they involved professional judgments about the competency of podiatrists.

> This evidence indicates that defendants were acting in large measure pursuant to an "important quality control component" in the administration of the hospital. As one court described it, the hospital's obligation is "to exact professional competence and the ethical spirit of Hippocrates as conditions precedent to . . . staff privileges." We conclude that the nature of this consideration of whom to grant hospital staff privileges is a necessary assurance of good health care; certainly, this is the rendering of "professional services" which is now excluded from the aegis of G.S. 75-1.1.

Cameron, 58 N.C. App. at 446-447, 293 S.E.2d at 920-921 (alteration in original) (first quoting Walter Wadlington, Jon R. Waltz, & Roger B. Dworkin, *Cases and Materials on Law and Medicine* 209 (1980); then quoting *Sosa v. Bd. of Managers of Val Verde Mem'l Hosp.*, 437 F.2d 173, 174 (5th Cir. 1971)). Clearly it takes medical knowledge to be able to assess the skills and competency of medical doctors. But, in this case, ironically, it is precisely the lack of professional judgment in HNS's utilization management procedures that has led plaintiffs here to allege that the organization is committing an unfair trade practice. Plaintiffs allege that, instead of using professional judgment to decide what services in-network patients need, HNS is simply using a mathematical formula based on the average costs of all its providers. But more fundamentally, if HNS is indeed failing to identify conflicts of interest in some manner that is deceptive, or misrepresenting its services and benefits to providers, those are matters relating to how it conducts its business dealings. To illustrate this principle, if HNS had a routine practice of repeatedly leasing medical office space without disclosing that the buildings were uninhabitable, the learned professions exception would not apply even though the routine practice might keep them in business, which, in turn, would facilitate insured patients receipt of chiropractic services. *Cf. Creekside Apts. v. Poteat*, 116 N.C. App. 26, 36-38, 446 S.E.2d 826,

833-34 (failure to maintain dwellings in a safe, fit, and habitable condition while demanding rent is an unfair and deceptive trade practice), *disc. rev. denied*, 338 N.C. 308, 451 S.E.2d 632 (1994). Typically, specialized medical knowledge is not necessary to ascertain that a building is uninhabitable. Similarly, specialized medical knowledge is not necessary to determine whether HNS is implementing a utilization review procedure without being authorized or licensed to do so or is failing to follow statutory requirements for utilization review.

It may be that plaintiffs cannot prove their allegations, but the sufficiency of their evidence is not at issue here. The allegations of the complaint, taken as true, establish a UDTP claim independent of the antitrust allegations. Expanding the learned profession exception to apply here goes further than what the General Assembly intended when it amended the statute in 1977. When chiropractors are treating patients, the learned profession exception should apply. But when they are running a business processing, administering, and negotiating payments by insurance companies to networked chiropractors, they are in commerce like every other business and should be governed accordingly.

Chief Justice BEASLEY joins in this opinion.

TOWN OF NAGS HEAD
v.
WILLIAM W. RICHARDSON AND WIFE, MARTHA W. RICHARDSON

No. 244A18

Filed 14 June 2019

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 874 (2018), reversing a judgment notwithstanding the verdict entered on 17 October 2016 by Judge Gary E. Trawick in Superior Court, Dare County, and remanding for a new trial. Heard in the Supreme Court on 29 May 2019 in session in the State Capitol Building in the City of Raleigh.

Hornthal, Riley, Ellis & Maland, L.L.P., by Benjamin M. Gallop and M.H. Hood Ellis, for plaintiff-appellant/appellee.

Nexsen Pruet, PLLC, by David P. Ferrell and Norman W. Shearin, for defendant-appellants/appellees.

PER CURIAM.

For the reasons stated in the majority opinion, this Court affirms the decision of the Court of Appeals. Further, to clarify the remand order, the sole issue on remand is the fair market value of the easement or, as presented to the jury, "What was the fair market value of the 10-year beach nourishment easement on the Richardsons' property taken by the Town of Nags Head at the time of taking?". *See* N.C.G.S. § 40A-64(b)(ii) (2017) ("If there is a taking of less than the entire tract, the measure of compensation is . . . the fair market value of the property taken.").

AFFIRMED.

Justice DAVIS did not participate in the consideration or decision of this case.

IN RE F.S.T.Y.

[372 N.C. 350 (2019)]

IN THE MATTER OF F.S.T.Y., A.A.L.Y.	)	1. RESPONDENT FATHER:
	)	PETITION FOR WRIT OF
	)	CERTIORARI TO REVIEW
	)	ORDER OF DISTRICT COURT,
	)	DAVIDSON COUNTY
	)	
	)	2. GAL'S MOTION TO
	)	DISMISS APPEAL

129A19

SPECIAL ORDER

The motion to dismiss is ALLOWED, and respondent father's petition for writ of certiorari is ALLOWED. The previously established briefing schedule in this matter remains unchanged.

By order of the Court in Conference, this the 11th day of June, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of June, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

In re Z.W.

[372 N.C. 351 (2019)]

IN THE MATTER OF	)	
	)	
Z.W., Z.W.	)	
	)	From Durham County
	)	
	)	
	)	

No. 116A19

ORDER

On 12 December 2018, the District Court, Durham County terminated respondent-father's paternal rights, and respondent gave notice of appeal on 7 January 2019. In his notice of appeal, respondent designated the Court of Appeals as the reviewing court rather than this Court. This Court allows respondent's petition for writ of certiorari that recognizes this Court is now statutorily designated to hear the appeal. This Court ratifies the existing briefing schedule as set for the appeal. Respondent has already filed the settled record and his appellant brief; the appellee brief is due on 3 June 2019. Should appellant wish to file a reply brief, the reply brief will be due on 17 June 2019.

By order of the Court in Conference, this 22nd day of May, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of May, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2019

002A19	State v. John Thomas Coley	1. State's Motion for Temporary Stay (COA18-234) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/04/2019** 2. Allowed **03/28/2019** 3. ---
006A19	State v. Patrick Mylett	Motion to Admit Eugene Volokh *Pro Hac Vice*	Allowed
011A19	State v. Tyler Deion Greenfield	1. Def's Notice Of Appeal Based Upon a Dissent (COA17-802) 2. State's PDR Under N.C.G.S § 7A-31 3. State's Motion for Temporary Stay 4. State's Petition for *Writ of Supersedeas* 5. Joint Motion to Stay Briefing	1. --- 2. Allowed 3. Allowed **01/23/2019** 4. Allowed **01/23/2019** 5. Allowed **01/29/2019**
022P19-2	State v. Jennifer Jimenez/April Myers	1. Def's *Pro Se* Motion for Review 2. Def's *Pro Se* Motion to Proceed as Indigent	1. Dismissed 2. Allowed
030P19	State v. Robert Paul DeLair	1. Def's Motion for Temporary Stay (COA18-124) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed **01/23/2019** Dissolved **06/11/2019** 2. Denied 3. --- 4. Denied 5. Allowed **Davis, J., recused**
042A19	Accardi v. Hartford Underwriters Insurance Company	1. Motion to Admit Gary E. Mason *Pro Hac Vice* 2. Motion to Admit Daniel R. Johnson *Pro Hac Vice* 3. Motion to Admit Gary M. Klinger *Pro Hac Vice*	1. Allowed **05/15/2019** 2. Allowed **05/15/2019** 3. Allowed **05/15/2019**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2019

045P19	D.A.N. Joint Venture Properties of North Carolina, LLC v. N.C. Grange Mutual Insurance Company	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-265) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
046P19	In the Matter of E.M.	1. State's Motion for Temporary Stay (COA18-685) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Respondent's Motion for Extension of Time to File Response to PDR	1. Allowed **01/31/2019** Dissolved **06/11/2019** 2. Denied 3. Denied 4. Allowed **03/04/2019**
050P19	Jonathan E. Brunson v. Office of the District Attorney for the 12th Prosecutorial District, the North Carolina Department of Social Services, and the State of North Carolina	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-658)	Denied
051P19	Ted P. Chappell and Sarah S. Chappell v. North Carolina Department of Transportation	Def's PDR Prior to a Determination of the COA	Allowed
057P19	Jonathan E. Brunson v. North Carolina Department of Justice, North Carolina Department of Public Safety, and the State of North Carolina	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-837)	Denied
061P19	Jonathan E. Brunson v. North Carolina Department of Justice and State of North Carolina	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-656)	Denied
064P19	State v. Tony Johnell Mills	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-315) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2019

069P19	Propst Bros. Dists., Inc., Plaintiff v. Shree Kamnath Corp., Defendant and McDonalds Corp., Third-Party Intervenor	Def and Third-Party Intervenor's PDR Under N.C.G.S. § 7A-31 (COA18-519)	Denied
071P19	Hartley Ready Mix Concrete Manufacturing, Inc. v. Timothy Aaron Coble and Forsyth Redi-Mix, Inc.	1. Def's (Forsyth Redi-Mix, Inc.) Petition for *Writ of Certiorari* to Review Order of the COA (COA18-580) 2. Plt's Motion to Strike Reply to Response to Petition for *Writ of Certiorari*	1. Denied 2. Dismissed as moot
088P19	State v. Thomas T. Dillard, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorar*i to Review Order of the COA (COAP19-26) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed as moot **06/06/2019** 2. Allowed **06/06/2019**
091P19	State v. Wayne Lee Davis	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA (COAP19-111) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Richmond County 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed as moot
099P19	Gwendolyn Dianette Walker, Widow of Robert Lee Walker, Deceased Employee v. K&W Cafeterias, Employer, Liberty Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-429)	Allowed
102P19	State v. Christopher Lee Neal	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
103P19	State v. Jasmine L. Burton	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Person County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2019

116A19	In the Matter of Z.W., Z.W.	Respondent-Father's Conditional Petition for *Writ of Certiorari* to Review Order of District Court, Durham County	Special Order **05/22/2019**
121P15-3	State v. Aggrey Winston Manning	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA (COAP16-824)	Dismissed **Ervin, J., recused** **Davis, J., recused**
125P19	Tillie Stewart v. James R. Shipley, DPM, Instride Mt. Airy Foot and Ankle Specialists, PLLC D/B/A Mt. Airy Foot & Ankle Center, and Northern Hospital District of Surry County	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-745)	Denied **Davis, J., recused**
125PA18	In the Matter of E.D.	Motion to Stay Mandate & Order Remand to the COA	Denied **05/28/2019** **Davis, J., recused**
129A19	In the Matter of: F.S.T.Y., A.A.L.Y.	1. Respondent-Father's Petition for *Writ of Certiorari* to Review Order of District Court, Davidson County 2. GAL's Motion to Dismiss Appeal	1. Special Order 2. Special Order
131P16-11	State v. Somchai Noonsab	Def's *Pro Se* Motion to Dismiss of Judicial Notice	Dismissed
137P19	Jane Doe v. Wake County, et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-109)	Denied
139P19	State v. Tariq Elijah Everette	Def's *Pro Se* Motion for PDR	Dismissed
141A19	State v. Jeff David Steen	1. Def's Notice of Appeal Based Upon a Dissent (COA18-233) 2. Def's PDR as to Additional Issues	1. --- 2. Allowed **Davis, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2019

143P19	State v. Lacedric Jamal Lane	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-444) 2. Def's Motion for Leave to File Reply in Support of PDR	1. Denied 2. Dismissed
156A17-2	DiCesare, et al. v. The Charlotte-Mecklenburg Hospital Authority	1. Plt's Motion to Admit Kathleen Konopka *Pro Hac Vice* 2. Plt's Motion to Admit Alexander L. Simon *Pro Hac Vice* 3. Plt's Motion to Admit Benjamin E. Shiftan *Pro Hac Vice* 4. Plt's Motion to Admit Daniel Seltz *Pro Hac Vice* 5. Plt's Motion to Admit Adam Gitlin *Pro Hac Vice* 6. Plt's Motion to Admit Brendan P. Glackin *Pro Hac Vice*	1. Allowed **06/11/2019** 2. Allowed **06/11/2019** 3. Allowed **06/11/2019** 4. Allowed **06/11/2019** 5. Allowed **06/11/2019** 6. Allowed **06/11/2019**
164P19	State v. Ronald P. Cameron	Def's *Pro Se* Motion to Dismiss Prosecution	Dismissed
165P19-2	In re Bart F. McClain	1. Petitioner's *Pro Se* Motion for Emergency Appeal 2. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed **06/04/2019** 2. Denied **06/04/2019**
166P19	State v. Darwin Newkirk	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA18-670) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Petition in the Alternative for *Writ of Certiorari* to Review Decision of the COA	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
168A19	Cardiorentis AG v. IQVIA LTD. and IQVIA RDS, Inc.	1. Defs' Motion to Admit Michael Joseph Klisch *Pro Hac Vice* 2. Defs' Motion to Admit Robert Thomas Cahill, Jr. *Pro Hac Vice* 3. Defs' Motion to Admit Joshua M. Siegel *Pro Hac Vice*	1. Allowed 2. Allowed 3. Allowed
176P19	State v. Derrick Lamonz Downey	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/10/2019**
177P19	Ricky Ray Rich, Jr. v. Mike Slagel (Superintendent)	Petitioner's *Pro Se* Motion for Notice of Appeal (COAP19-269)	Dismissed **05/14/2019**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2019

178P19	State v. Anthony Ray Solomon	Def's *Pro Se* Motion for PDR	Dismissed
179P19	State v. Joseph Donald Carroll	Def's *Pro Se* Motion for Appropriate Relief	Dismissed
181A93-4	State v. Rayford Lewis Burke	*Amicus*' (ACLU-NCLF) Motion to Substitute Counsel	Allowed **Ervin, J., recused**
181P19	State v. Shane Evilsizer	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	Dismissed
182P19	Thomas Gilson v. Kathleen Deschenes	1. Def's *Pro Se* Motion for Emergency Appeal 2. Def's *Pro Se* Motion to Waive Fee	1. Dismissed **05/16/2019** 2. Allowed **05/16/2019**
183P19	State v. Coriante Pierce	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
187P19	State v. Joe Willard Williamson, Jr.	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA18-521) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
188A19	State v. Jeffery Martaez Simpkins	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/21/2019** 2. Allowed **06/05/2019**
194P19-1	David Ezell Simpson v. Sheriff McFadden, State of North Carolina	Chapter 17 *Writ of Habeas Corpus* Article I Constitutional Provisions	Dismissed without prejudice **05/24/2019**
194P19-2	David Ezell Simpson v. Sheriff McFadden, State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed without prejudice **06/11/2019**
195A19	State v. Chad Cameron Copley	1. Application for Temporary Stay (COA18-895) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/23/2019** 2.

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196A19	State v. David Leroy Carver	1. Motion for Temporary Stay 2. Petition for *Writ of Supersedeas*	1. Allowed **05/28/2019** 2.
201A19	State v. David Alan Keller	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **06/04/2019** 2.
203P19	State v. Frederick Lynn Ingram	1. Def's *Pro Se* Motion for Petition for Appeal 2. Def's *Pro Se* Motion for Arrest Judgment	1. Denied **06/04/2019** 2. Denied **06/04/2019**
206A19	State v. Ben Lee Capps	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/05/2019** 2.
233P12-2	State v. Montrez Benjamin Williams	1. State's Motion for Temporary Stay (COA16-178) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion for Temporary Stay 5. Def's Petition for *Writ of Supersedeas* 6. Def's PDR Under N.C.G.S. § 7A-31 7. Def's Alternative Notice of Appeal Based Upon a Constitutional Question 8. State's Motion to Dismiss	1. Allowed **10/05/2018** 2. Allowed 3. Allowed 4. Allowed **10/05/2018** 5. Allowed 6. Allowed 7. — 8. Allowed
233P14-2	State v. Domenico Alexander Lockhart	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP19-160) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Guilford County 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed 3. Dismissed as moot **Ervin, J., recused** **Davis, J., recused**

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244A18	Town of Nags Head v. William W. Richardson and Wife, Martha W. Richardson	1. Plt's Notice of Appeal Based Upon a Dissent (COA17-498) 2. Defs' Notice of Appeal Based Upon a Dissent 3. Defs' Amended Notice of Appeal Based Upon a Dissent 4. Defs' PDR Under N.C.G.S. § 7A-31 5. Defs' Petition for *Writ of Certiorari* to Review Decision of the COA 6. Plt's Motion to Dismiss and Strike Defs' Cross-Appeal and PDR 7. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Dismissed as moot 3. Dismissed *ex mero motu* 4. Dismissed 5. Denied 6. Dismissed as moot 7. Denied **03/27/2019** **Davis, J., recused**
249P17-2	Columbus County Department of Social Services v. Calvin Tyrone Norton	1. Def's *Pro Se* Motion for Notice of Appeal Based on a Dissenting Opinion (COA18-642) 2. Plt's Motion to Dismiss Appeal	1. --- 2. Allowed
261P18-2	North Carolina State Conference of the National Association for the Advancement of Colored People v. Tim Moore, in his official capacity, Philip Berger, in his official capacity	Plt's PDR Prior to a Determination of the COA (COA19-384)	Denied
361P18	Celina Quevedo-Woolf v. Merry Eileen Overholser and Daniel Carter	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-1344, 17-675) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Temporary Stay 4. Plt's Petition for *Writ of Supersedeas* 5. Plt's Motion for Addendum 6. Plt's Motion to Stay 6 November 2018 Trial Court Hearing	1. Dismissed *ex mero motu* 2. Denied 3. Allowed **11/05/2018** Dissolved **06/11/2019** 4. Denied 5. Dismissed as moot 6. Denied **11/05/2018**

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362P18	State v. Douglas Nelson Edwards	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-337) 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County	1. Denied 2. Dismissed
378P18-3	State v. Napier Sandford Fuller	1. Def's *Pro Se* Motion for Notice and Request for Disability Accommodations to Ensure Due Process 2. Def's *Pro Se* Motion for Petition for Rehearing of an Administrative Matter	1. Dismissed 2. Dismissed
388P18-2	Adam T. Cheatham, Sr. v. Town of Taylortown	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA18-625) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
400P18	State v. William Davis	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1340) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
428P18	State v. Raymond Joiner	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-186)	Denied
437PA18	Chavez, et al. v. Carmichael	1. ACLU of NC Legal Foundation's Motion to Admit Cody Wofsy *Pro Hac Vice* 2. ACLU of NC Legal Foundation's Motion to Admit Daniel Galindo *Pro Hac Vice* 3. ACLU of NC Legal Foundation's Motion to Admit Omar Jadwat *Pro Hac Vice* 4. ACLU of NC Legal Foundation's Motion to Admit Spencer Amdur *Pro Hac Vice*	1. Allowed **06/06/2019** 2. Allowed **06/06/2019** 3. Allowed **06/06/2019** 4. Allowed **06/06/2019**
438P18	James A. Bradley, Employee v. Cumberland County, Employer, Self-Insured (Key Risk Management Services, Inc., Servicing Agent)	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-334)	Denied

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448P18	State v. Justin Delane Kraft	1. State's Motion for Temporary Stay (COA18-330) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/21/2018** Dissolved **06/11/2019** 2. Denied 3. Denied
482P13-3	State v. Carl Lynn Williams	Application for *Writ of Habeas Corpus*	Denied **05/28/2019**
597P01-5	State v. Maechel Shawn Patterson	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP17-245)	Denied **Ervin, J., recused**
629P01-8	State v. John Edward Butler	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Robeson County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's Pro Se Petition for *Writ of Mandamus*	1. Denied **05/20/2019** 2. Allowed **05/20/2019** 3. Dismissed as moot **05/20/2019** 4. Denied **05/20/2019** **Davis, J., recused**

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